SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

L. P. STEUART & BRO., INC., PETITIONER,

vs.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 2, 1944.

[fol. 1] [Caption omitted]

[fol. 2] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 22634

L. P. Steuart & Bro., Inc., a Corporation, Plaintiff,

v.

Chester Bowles, Administrator, Office of Price Administration, Federal Office Building No. 1, Washington, D. C.; Robert K. Thompson, District Director, District of Columbia, Office of Price Administration, 5601 Connecticut Avenue, N. W., Washington, D. C.; John L. Laskey, District Enforcement Attorney, District of Columbia, Office of Price Administration, 5601 Connecticut Avenue, N. W., Washington, D. C., Defendants

Complaint for Temporary Restraining Order, Injunction Pendente Lite and Permanent Injunction—Filed January 7, 1944

The complaint of L. P. Steuart & Bro., Inc., against the defendants, Chester Bowles, Administrator, Robert K. Thompson, District Director, District of Columbia, John L. Laskey, District Enforcement Attorney, District of Columbia, Office of Price Administration, respectfully shows the Court:

1. That plaintiff is a corporation organized under the laws of the State of Delaware with its principal office and place of business located at 138 Twelfth Street, N. E., in the City of Washington, District of Columbia. The defendant Chester Bowles is the Administrator of the Office of Price Administration, the defendant Robert K. Thompson is the District Director, Office of Price Administration, for the District of Columbia, the defendant John L. Laskey is the District Enforcement Attorney, Office of Price Administra-
[fol. 3] tion, for the District of Columbia. Each of the defendants is sued in his official capacity above set forth. The defendants and each of them, in their official capacities,

have the duty, among others, of enforcing the regulations, rules and orders of the Office of Price Administration in effect in the District of Columbia. This action is for a temporary restraining order, injunction *pendente lite* and permanent injunction restraining the defendants from enforcing or attempting to enforce a purported order bearing date December 31, 1943, of one Talbot Smith, now resigned, but on December 31, 1943, Hearing Administrator of the Office of Price Administration (said order hereinafter being more fully described), which action is within the jurisdiction of this Court.

2. The plaintiff is and has been since, to wit, the year 1904, engaged in the retail fuel business in the District of Columbia and, since, to wit, 1928 has been and now is engaged in the retailing of various types of fuel oil, and other products. In the course of its fuel oil business the plaintiff has invested approximately the sum of $750,000.00 in the District of Columbia in railroad sidings, tracks, wharves, docks, trucks, pumps, heating equipment, office equipment, storage fuel tanks, and other facilities necessary and useful for the conduct of its retail fuel oil business. Prior to the heating season of 1942-1943, the plaintiff at great expense increased its unloading facilities, storage facilities, and delivery facilities within the District of Columbia in compliance with recommendations made to retail fuel oil dealers in the limitation area by the Petroleum Administrator for War. In increasing its facilities as aforesaid the plaintiff has invested the sum of approximately $50,000.00. The other retail fuel oil dealers serving the District of Columbia and vicinity failed and neglected to expand their facilities as requested by the Petroleum Administrator for [fol. 4] War as aforesaid, and, by reason of the plaintiff's compliance with the recommendations of the said Petroleum Administrator for War the plaintiff during the heating season of 1942-1943, was, and now is better able to serve the retail purchasing public, and the Government of the United States, with fuel oil than are the plaintiff's competitors.

3. On or about the 6th day of February, 1943, there were issued by the then Administrator, Office of Price Administration, Prentiss M. Brown, in his capacity as Administrator as aforesaid, purporting to act pursuant to authority purported to have been conferred upon him by Executive Orders 9125 and 9280, War Production Board Directive No.

1 as Supplemented, and Food Directive No. 1 of the Secretary of Agriculture, issued certain regulations designated by him as "Part 1300—Procedure (Procedural Regulation 4)" and hereinafter referred to as Procedural Regulation 4. Copy of said Procedural Regulation 4 is attached hereto marked Exhibit 1, and prayed to be read and considered as a part hereof. The said Procedural Regulation 4 describes its purpose and application in Section 1300.151 as follows:

> "It is the purpose of this regulation to prescribe the procedure used by the Office of Price Administration in the issuance of rationing suspension orders. The regulation does not apply to suspension orders issued by War Price and Rationing Boards, but Sec. 1300.169 of this regulation prescribes the procedure used on appeal from such orders."

It defines the term "suspension order" in its Section 1300.180 (f) as follows:

> " 'Suspension Order' means an order which regulates or prohibits, for a period, the sale, transfer, delivery or other disposition or the acquisition or use of commodities or facilities, and which is issued against a person who has acted in violation of a rationing order or regulation."

By the provisions of said regulations a procedure is set up for the preferring of charges against alleged violators of rationing regulations or orders, the hearing of such charges, the determination by a "hearing commissioner" of [fol. 5] the charges, the issuing of suspension orders by such hearing commissioner, appeal from such order, and procedure on appeal.

4. Purporting to act pursuant to the authority of said Procedural Regulation 4, and acting for and on behalf of Walter Cellhorn, Regional Attorney, Region 2, Office of Price Administration, one Carl W. Berueffy, in his capacity as Chief Enforcement Attorney, District of Columbia Office of Price Administration, acting on behalf of and under direction of John L. Laskey, District Enforcement Attorney, District of Columbia Office of Price Administration, issued a notice on August 9, 1943, to the plaintiff, in the form

specified by Section 1300.153 of said Procedural Regulation 4, wherein the plaintiff was notified that it was charged with having violated the provisions of Ration Order No. 11, Fuel Oil Rationing Regulations (Form OPA-R-1115 (Rev.)), was further notified of the time and place of hearing, and was further notified that the purpose of the hearing would be to provide the hearing commissioner with information from which to determine whether a suspension order should be issued prohibiting the plaintiff from receiving any deliveries or transfers of or using fuel oil or any other products, commodities, or facilities then or thereafter rationed by the Office of Price Administration or prohibiting the plaintiff from selling, transferring, delivering, or otherwise dealing in fuel oil or any other products, commodities, or facilities which might then or thereafter be rationed by the Office of Price Administration, or both, for such period of time as might be deemed appropriate in the public interest, and to conserve the supply of such products, commodities, or facilities for military and essential civilian uses. A copy of said notice and specification of charges is attached hereto, marked Exhibit 2, and prayed to be read and considered as a part hereof. Copy of Ration Order No. 11, referred to in the notice of hearing and specifications, is attached hereto, marked Exhibit 3.

[fol. 6] 5. Thereafter on, to wit, August 31, 1943, September 1, 1943, September 18, 1943, September 20, 1943, and October 22, 1943, hearings were held pursuant to said notice, and, thereafter, on, to wit, November 8, 1943, Clifford R. Snider, then Acting Hearing Commissioner, Office of Price Administration, Region 2, issued a purported suspension order and opinion, copy of which is attached hereto, marked Exhibit 4, and prayed to be read and considered as a part hereof. By said suspension order and opinion the said Clifford R. Snider, as Acting Hearing Commissioner, purported to find the plaintiff guilty of certain of the charges set forth in the specifications attached to the notice of hearing, and not guilty of others. Among the terms of the said suspension order was a provision prohibiting the plaintiff from transferring any fuel oil directly or indirectly to any consumer to whom it made no transfer of oil from July 1, 1942, to July 1, 1943.

6. Thereafter the plaintiff appealed to the Hearing Administrator, Office of Price Administration, from the said

suspension order, copy of plaintiff's notice of appeal being attached hereto, marked Exhibit 5, and prayed to be read and considered as a part hereof. The defendant John L. Laskey, in his official capacity as aforesaid, also appealed from the said order of the Hearing Commissioner, copy of his notice of appeal being attached hereto, marked Exhibit 6, and prayed to be read and considered as a part hereof. Thereafter a hearing was had by Talbot Smith, then Hearing Administrator of the Office of Price Administration, now resigned, and thereafter on, to wit, December 31, 1943, the said Talbot Smith issued a so-called "Decision on Appeal," copy of which is attached hereto, marked Exhibit 7, and prayed to be read and considered as a part hereof. At the conclusion of said Decision on Appeal the said Talbot Smith ordered that the suspension order of the Hearing Commissioner (Exhibit 4) be modified to read as follows:

[fol. 7] "A. From January 15, 1944 to December 31, 1944, both dates inclusive, respondent shall not, directly or indirectly, receive delivery of fuel oil for resale or transfer to any consumer, nor shall respondent transfer fuel oil to any consumer, provided that (1) if respondent on or before January 10, 1944 delivers to the District Enforcement Attorney of the District of Columbia District Office a duly verified list of the names and addresses of all consumers to whom respondent sold and delivered fuel oil from October 21, 1941 through October 21, 1942, and (2) if respondent surrenders to the District of Columbia District Office before January 15, 1944 all void or expired ration evidences (or delivery receipts) then in its possession, then and in that event respondent may from January 15, 1944 to December 31, 1944, both dates inclusive, transfer fuel oil to any consumer to whom it transferred fuel oil between October 21, 1941 through October 21, 1942. both dates inclusive, and may receive deliveries of sufficient quantities of fuel oil for purposes of resale and transfer to such consumers.

"B. Within thirty (30) days after the receipt of a copy of this order, respondent shall render an accounting to the Director of the District of Columbia District Office (1) for all fuel oil transferred or received by the respondent during the period from 12:01 a. m.,

October 22, 1942, to the date of such accounting, (2) for all coupons, ration evidences (or delivery receipts) received by or surrendered by the respondent during said period, and (3) showing the quantity of fuel oil (by physical inventory), and coupons, ration evidences (or delivery receipts), on hand and on deposit in its ration bank account as of the date of said accounting.

"C. If at any time during the period of this suspension the Petroleum Administrator for War or his duly authorized agent certifies to the Director of the District of Columbia District Office that the fuel oil needs of the District of Columbia or the area served by respondent cannot be met by the supplies and facilities of other suppliers and dealers in this area in addition to those of respondent's as herein restricted, and that it is, therefore, essential to the welfare of the community that the provisions of this order should be modified, and the District Director joins with respondent in a petition requesting such modification, an order of modification may be entered either by the Chief Hearing Commissioner of Region II or the Hearing Commissioner who heard the case below removing the restrictions herein imposed to the extent such action is shown to be necessary to the welfare of the community or the war effort.

"D. Any terms used in this suspension order that are defined in Ration Order No. 11, shall have the meaning therein given to them."

7. All of the said proceedings referred to in Paragraphs 4 to 7, inclusive, hereof, and orders issued pursuant thereto, were and are void and of no legal force or effect. The making of charges of the nature set forth in Exhibit 2 hereto, the hearing of the same or the entry of any so-[fol. 8] called "suspension order" is not authorized by any statute or valid executive order, proclamation, or regulation. The said charges (Exhibit 2) were filed and the proceedings hereinbefore set forth were held for the purpose of determining the penalty, or the amount of punishment to be imposed upon the plaintiff by reason of alleged violations of regulations and the order contained in the Decision on Appeal (Exhibit 7) is the assessment of a penalty or punishment for alleged infractions or violations

of regulations. None of the defendants have authority under any statute or valid executive order or Governmental regulation to prohibit the plaintiff from receiving delivery of fuel oil for resale or transfer, provided that in so receiving such oil the plaintiff complies with regulations of general force and effect, and none of the defendants have authority under any statute or valid executive order or Governmental regulation to prevent the plaintiff from selling, transferring, or delivering fuel oil to any person, firm, or corporation, provided such sale, transfer, or delivery is made in compliance with laws, regulations, or orders of general effect. None of the defendants, or any officer of the Office of Price Administration, has authority under any statute or valid executive order or Governmental regulation to assess a penalty or punishment for past violations of regulations of the Office of Price Administration. The plaintiff is advised and therefore avers that Section 301 of the Act approved March 27, 1942, Public Law 507—77th Congress, commonly known as the "Second War Powers Act, 1942," provides the exclusive remedies for the enforcement of the plaintiff's liabilities or duties created by said statute or any rule, regulation, or order thereunder whether theretofore or thereafter issued; that if the said order of the Hearing Administrator of December 31, 1943 (Exhibit 7) is enforced the plaintiff will have been penalized and [fol. 9] punished for alleged violations of regulations of the Office of Price Administration issued pursuant to the Second War Powers Act, 1942, without proceedings having been brought in the District Courts of the United States as provided by said Second War Powers Act, 1942, and without having been found guilty of violations by any such court. The said order is in further violation of War Production Board Directive No. 1, under the purported authority of which Directive No. 1 the said order was purported to have been issued, in that the said Directive No. 1 expressly prohibits the Office of Price Administration to control the acquisition of products by or for the account of the Army or Navy of the United States, the United States Maritime Commission, the Panama Canal, the Coast and Geodetic Survey, the Coast Guard, the Civil Aeronautics Authority, the National Advisory Commission for Aeronautics, or the Office of Scientific Research and Development, or to Government agencies or other persons acquiring products for export to and consumption or use in any

foreign country, whereas the said order of December 31, 1943, if enforced, would prohibit the plaintiff from directly or indirectly receiving delivery of fuel oil for resale to the above mentioned Government commissions, authorities, and agencies and would prohibit the sale or delivery by the plaintiff to any of the said commissions, offices, and agencies. The said order is in further violation of the Fuel Oil Rationing Regulations (Ration Order No. 11) of the Office of Price Administration in that Section 1394.5661 of said Ration Order No. 11 provides that from and after November 1, 1942, no dealer or supplier shall discriminate in the transfer of fuel oil, among consumers entitled to acquire fuel oil under said Ration Order No. 11, whereas said Order of December 31, 1943, requires the discrimination by the plaintiff against consumers who were not the plaintiff's customers in the year October 21, 1941, to October 21, 1942, and in favor of those consumers who were the plaintiff's customers during that year.

[fol. 10] 8. The plaintiff, at the time of the first hearing of said charges before the Hearing Commissioner, duly made his contention that the proceedings and any suspension order that might issue as a result thereof were void for lack of authority to institute or hear the aforesaid charges (Exhibit 2), and at all times during said hearing, and during the proceedings on appeal from the suspension order and opinion of the Hearing Commissioner urged the contention that there was no authority for such proceedings or order but the said contention was overruled or disregarded, the Hearing Commissioner in his suspension order and opinion (Exhibit 4, Page 2) stating as follows:

> "At the outset of the hearing respondent raised the question as to the validity of suspension proceedings and of the power of the Acting Hearing Commissioner, not only to conduct the hearing, but to issue a suspension order. This question is one of constitutional law which the Acting Hearing Commissioner has no jurisdiction or authority to determine. The respondent was advised that the hearing was being held under Procedural Regulation No. 4 prescribed by the Office of Price Administration which safeguards the rights of respondent and accords respondent due process of law. Further comment upon the objection raised by the respondent would serve no useful purpose."

Although the plaintiff urged among other grounds for appeal that (Exhibit 5):

> "(1) The Acting Hearing Commissioner erred in undertaking the hearing of Suspension Proceedings, because neither he nor any official in the Office of Price Administration has any power in law to order a suspension or partial suspension of Respondent's right to do business or to impose any other penalty,"

and

> "(c) The Acting Hearing Commissioner erred in making each and all of his Findings of Fact in that a finding by him or by any other official of the Office of Price Administration is of no force or effect in the determination as to whether or not a suspension, partial suspension, or other penalty may be imposed, inasmuch as the only effective finding of fact or conclusion of law must be by a judicial tribunal,"

and

> "(4) The Acting Hearing Commissioner erred in making each and all of his Conclusions of Law in that a conclusion by him or by any other official of the Office of Price Administration is of no force or effect in the determination as to whether or not a suspension, partial [fol. 11] suspension, or other penalty may be imposed, inasmuch as the only effective Finding of Fact or Conclusion of Law must be by a judicial tribunal,"

and

> "(1) That the proceedings herein are void and that no officer or official of the Office of Price Administration has legal authority or power to assess any penalty or suspension against Respondent;
>
> "(2) That Respondent's constitutional rights are violated by the order or other penalty imposed by the Office of Price Administration,"

the defendant, John L. Laskey, in his official capacity as aforesaid, urged before the Hearing Administrator that the Hearing Administrator could not consider the issue as to the power of the Office of Price Administration or of the Hearing Commissioner to issue a suspension order. The Hearing Administrator at the hearing on appeal refused to

allow the question as to his authority to be argued, and the said Decision on Appeal (Exhibit 7, Page 1, Paragraph 3) expressly states:

> "The jurisdictional issue raised by respondent (meaning plaintiff) are not matters upon which either the Hearing Commissioner or the Hearing Administrator is empowered to pass. * * * It is a well-established rule of law that an adminstrative tribunal may not pass upon the validity of the statutes or orders that create it. This principle, of course, does not preclude respondent from raising such an issue in a proper forum."

9. If the said order of December 31, 1943, issued by the Hearing Administrator of the Office of Price Administration (Exhibit 7) or any substantial part thereof is enforced, the plaintiff will suffer irreparable damage. The plaintiff's business is strictly seasonal and of such a type that a large proportion of the plaintiff's customers change from year to year; that is to say there is a large percentage of turnover from year to year in the plaintiff's customers (approximately 15% to 20%); that due to the shifting of population to and from the District of Columbia and vicinity, which shifting population has been i-tensified by war conditions, by reason of deaths, going out of business, changes in own- [fol. 12] ership of businesses, entering into business of users and potential users of fuel oil, the destruction and construction of buildings requiring heat, the changing or conversion of heating systems and other factors having no relation to orders of the Office of Price Administration, such turnover in customers will continue to take place and if the plaintiff is unable to replace the business of prior customers by acquiring new customers, the plaintiff will be forced either to discontinue its business or to continue at a great loss. The plaintiff's books and records do not show the names and addresses of all consumers to whom the plaintiff sold and delivered fuel oil from October 21, 1941, through October 21, 1942, because, where sales or deliveries were made for cash, no account with the customer would be shown on the books of the plaintiff. A large percentage of the plaintiff's sales have been and are for cash. The plaintiff's records as to other customers for the year October 21, 1941, to October 21, 1942, are incomplete, and it is impossible for the plaintiff to comply with the condition set forth in the

said order of December 31, 1943, that the plaintiff furnish a duly verified list of the names and addresses of all consumers to whom the plaintiff sold and delivered fuel oil from October 21, 1941, through October 21, 1942. The plaintiff as aforesaid (Paragraph 2) increased its facilities for the storage and handling of fuel oil pursuant to recommendations by the Petroleum Administrator for War at a total expense of approximately $50,000.00 which will be wasted and of no use or benefit to the plaintiff or to the war effort if said order of December 31, 1943, is enforced, and a total loss when the emergency shall have ceased. The plaintiff is and will be unable to insure or assure that no violations of the said order will be committed because the plaintiff can act only through agents, servants, and employees and there is no method known to the plaintiff by which the plaintiff can prevent its order clerks, telephone [fol. 13] operators, and deliver- men from unwittingly serving customers who were not customers during the calendar year October 21, 1941, through October 21, 1942. Since, to wit, December 29, 1943, and as late as January 3, 1944, subsequent to the rendering of the order of the Hearing Administrator (Exhibit 7), the Division of Procurement of the United States Treasury Department, which acts as the purchasing agent or office of the various branches, departments, and agencies of the Government of the United States and of the District of Columbia, including the United States Navy, the United States Maritime Commission, the Panama Canal, the Coast and Geodetic Survey, the Coast Guard, and the Civil Aeronautics Authority, has purchased from the plaintiff in excess of 250,000 gallons of fuel oil, some of which was for the account or use of the United States Navy Torpedo Plant in Alexandria, Virginia, the United States Naval Medical Center at Bethesda, Maryland, and other agencies, departments, and commissions unknown to the plaintiff. By reason of the shortage of fuel oil available to competing distributors of fuel oil in the District of Columbia and vicinity, including the present contractor supplying the said Procurement Division of the Treasury Department, the said Procurement Division of the Treasury Department will continue to endeavor to purchase from the plaintiff fuel oil for the needs of the various departments, branches, agencies, offices, and commissions of the Government of the United States and of the District of Columbia. If the said order of December 31, 1943 (Exhibit 7) is en-

forced, the plaintiff will be unable to sell, transfer, or deliver fuel oil to the said Procurement Division or any of the departments, offices, commissions, or agencies of the United States Government or the District of Columbia. Among the institutions served by the plaintiff are hospitals, hotels, and apartment houses, none of which were customers of the [fol. 14] plaintiff in the year October 21, 1941, to October 21, 1942. Among the agencies for which the Procurement Division of the Treasury Department purchased fuel oil as aforesaid were Gallinger Hospital, Freedman's Hospital, and Howard University. Among other customers or institutions now being served by the plaintiff which were not customers or served by the plaintiff during the year October 21, 1941, to October 21, 1942, are housing developments financed by the Government, housing thousands of defense workers, and private homes housing defense workers, in addition to hundreds of other residences and business establishments, too numerous to mention.

10. By reason of the premises the plaintiff is without adequate remedy at law and the plaintiff and the public will suffer irreparable damage unless this court enjoins and prohibits the enforcement of the said order of December 31, 1943 (Exhibit 7). The said order of December 31, 1943, by its terms becomes effective prior to the time within which the defendants are required by the rules of this court to answer and prior to the time within which a memorandum in opposition to a motion for a preliminary injunction is required to be filed and a hearing had on a motion for a preliminary injunction. The plaintiff will suffer immediate and irreparable injury, loss, and damage unless a temporary restraining order is issued restraining and enjoining the enforcement of the said order of December 31, 1943, or any part thereof before the said order by its terms becomes effective.

Wherefore, the premises considered, plaintiff respectfully prays:

1. That this honorable court issue a temporary restraining order enjoining and restraining the defendants and each of them from enforcing or attempting to enforce the said order of December 31, 1943 (Exhibit 7) of the Hearing Administrator of the Office of Price Administration, or any part thereof.

[fol. 15] 2. That this Court issue a preliminary injunction enjoining and restraining the defendants and each of them from enforcing or attempting to enforce the said order of December 31, 1943 (Exhibit 7) of the Hearing Administrator of the Office of Price Administration, or any part thereof.

3. That this Honorable Court issue an injunction permanently enjoining and restraining the defendants and each of them from enforcing or attempting to enforce the said order of December 31, 1943 (Exhibit 7) of the Hearing Administrator of the Office of Price Administration, or any part thereof.

4. And for such other and further relief as to the court may seem just and proper.

L. P. Steuart & Bro., Inc. By Curtis S. Steuart, Secretary. (S.) Renah F. Camalier, 1366 National Press Building, Washington, D. C., Attorney for Plaintiff.

Duly sworn to by Curtis S. Stewart. Jurat omitted in printing.

* * * * * * *

[fol. 16] EXHIBIT "1" TO COMPLAINT

Procedural Reg. 4. Feb. 6, 1943

Office of Price Administration

Part 1300—Procedure

[Procedural Regulation 4]

Issuance of Rationing Suspension Orders

The Title and §§ 1300.151 to 1300.160 inclusive are amended as set forth herein.

Pursuant to the authority conferred upon the Administrator by Executive Order 9125, Executive Order 9280, War Production Board Directive No. 1 as supplemented, and Food Directive 1 of the Secretary of Agriculture the following rules are prescribed for the issuance of suspension orders:

Authority: §§ 1300.151 to 1300.181, inclusive, issued under Pub. Law 671, 76th Cong., as amended by Pub. Laws 89,

421 and 507, 77th Cong.; E. O. 9125, 7 F. R. 2719, issued April 7, 1942, WPB Dir. No. 1, 7 F. R. 562, as supplemented, E. O. 9280, 7 F. R. 10179, issued December 5, 1942, Food Directive 1 of the Secretary of Agriculture, 8 F. R. 827.

Purpose and Application of Procedural Regulation No. 4

§ 1300.151 *Purpose and application.* It is the purpose of this regulation to prescribe the procedure used by the Office of Price Administration in the issuance of rationing suspension orders. The regulation does not apply to suspension orders issued by War Price and Rationing Boards, but § 1300.169 of this regulation prescribes the procedure used on appeal from such orders.

Suspension order Proceedings

§ 1300.152 *Institution of proceedings.* Proceedings for the issuance of suspension orders shall be instituted by the service of a notice of hearing upon the respondent not less than three (3) days prior to such hearing.

§ 1300.153 *Notice of hearing.* A notice of any hearing to be held pursuant to this procedural regulation shall be issued by the Regional Attorney and shall set forth the time and place of hearing, a statement of the charges against the respondent, and a statement of the purpose for which the hearing is to be held.

(b) If the notice of hearing is served at least five (5) days before the date set for the hearing, the notice may provide that such hearing will be held only if respondent files with the Hearing Commissioner a request for such hearing and a statement of the general nature of his defense to each of the charges. Such notice shall fix the time for filing the request and statement, which shall be not less than three days after service of the notice.

(c) No hearing need be held if the respondent has failed to file the required request and statement within the time prescribed by a notice issued in accordance with paragraph (b) of this section.

§ 1300.154 *Hearing Commissioner; Presiding Officer; appointment and duties:* Any hearing held pursuant to this regulation shall be conducted by a Hearing Commissioner or such person as he may designate to conduct such hear-

ing (hereinafter called "presiding officer"). The Hearing Commissioner or a presiding officer shall preside at the hearing, administer oaths and affirmations, and rule on the admission and exclusion of evidence.

§ 1300.155 *Continuance or adjournment of hearing.* The hearing shall be held at the time and place specified by the notice of hearing, but the Hearing Commissioner or presiding officer may continue or adjoin the hearing to a later date or to a different place. Notice of such adjournment or continuance may be made by announcement at the hearing.

§ 1300.156 *Conduct of hearing.* (a) The hearing shall be conducted by the Hearing Commissioner or presiding officer in such manner as will permit the presentation of evidence and argument to the fullest extent compatible with fair and expeditious determination of the issues raised in the hearing. To this end:

(1) The respondent shall have the right to be represented by counsel of his own choosing.

(2) The rules of evidence prevailing in the courts of law or equity shall not be controlling.

(3) The Hearing Commissioner or presiding officer shall afford reasonable opportunity for cross-examination of witnesses.

(b) All hearings held pursuant to this procedural regulation shall be public.

§ 1300.157 *Subpoenas.* (a) Applications for subpoenas shall be filed with the Hearing Commissioner, who may thereafter grant or deny the application or refer it to the presiding officer. The subpoena shall be issued if such application is approved by the presiding officer.

(b) The application for subpoena shall specify the name and address of the witness and the nature of the facts to be proved by him and, if calling for the production of documents, shall specify them with such particularity as will enable them to be identified for purposes of production.

(c) Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees and mileage specified in

section 2 (a) (4) of the Act. When the subpoena is issued at the instance of the Regional Attorney, fees and mileage need not be tendered.

§ 1300.158 *Witnesses.* Witnesses summoned before a Hearing Commissioner or presiding officer at any hearing held pursuant to this regulation shall be paid the fees and mileage specified by section 2 (a) (4) of the Act. Witness fees and mileage shall be paid by the party at whose instance the witness appears.

§ 1300.159 *Contemptuous conduct.* Contemptuous conduct at any hearing shall be ground for exclusion from the hearing. The refusal of a witness to answer any question which has been ruled to be proper shall, in the discretion of the Hearing Commissioner, or presiding officer, be ground for the striking out of all testimony previously given by such witness on related matters.

§ 1300.160 *Transcript of hearing.* A stenographic report of all hearings shall be taken. The report need not be transcribed if such transcription is waived by the parties to the proceeding. If the report is transcribed, a copy shall be available for inspection during business hours at the Office of the Hearing Commissioner. Argument of counsel shall not be included in the report except at the direction of the Hearing Commissioner or presiding officer.

§ 1300.161 *Presiding officer's advisory report; service.* (a) A presiding officer who has conducted a hearing shall prepare an advisory report. Such report shall contain (1) findings of fact, (2) conclusions of law, and (3) recommendations with respect to the disposition of the matter.

(b) The advisory report shall be filed with the Hearing Commissioner, and copies thereof shall be served on the respondent and the Regional Attorney.

§ 1300.162 *Briefs on presiding officer's advisory report* (a) Any party may submit to the Hearing Commissioner a brief or written argument in opposition to or in support of the report of the presiding officer.

[fol. 17] (b) Such briefs shall be filed within five (5) days after the service of the presiding officer's report. Two (2) copies of the brief shall be filed with the Hearing Commissioner and a copy thereof served upon the opposing party at or before the time of filing.

(c) Briefs may be filed after the time prescribed by paragraph (b) of this section only with the permission of the Hearing Commissioner.

§ 1300.163 *Briefs after hearing before Commissioner.* The Hearing Commissioner may, upon the request of any party to a proceeding conducted by him, permit the filing of briefs or written argument. Such briefs or written argument shall be filed within such time as the Hearing Commissioner may prescribe.

§ 1300.164 *Waiver of hearing.* (a) If a respondent fails to appear at a hearing or fails to request a hearing when such request is required pursuant to § 1300.153 (b), he shall be deemed to have waived a hearing, and the charges set forth in the notice of hearing shall be deemed to be admitted for the purposes of the hearing. In such cases the Regional Attorney may present evidence relevant to the determination of the effective period of any suspension order which might be issued against the respondent.

(b) At any time prior to the tenth day after the service of a suspension order issued after a default, the respondent may file with the Hearing Commissioner who issued the order, a petition for the reopening of the proceedings, setting forth the grounds on which he believes his default should be excused. A copy of such petition shall be served upon the Regional Attorney at or prior to the time it is filed with the Hearing Commissioner. If the Hearing Commissioner grants the petition he shall notify the Regional Attorney and the respondent of the time and place set for the hearing and may set aside or stay the suspension order.

§ 1300.165 *Order of the Hearing Commissioner.* (a) If the Hearing Commissioner determines that a respondent has violated a rationing regulation or order he may issue a suspension order.

(b) Any suspension order hereunder shall set forth the findings of fact and conclusions of law upon which it is based, and shall contain a statement of the reasons why a suspension order should be issued unless such statement is set forth in an opinion accompanying the order.

ton in the amount of 162 gallons, in violation of Section 1394.5666 (a) of Ration Order No. 11.

217. On or about the 21st day of April, 1943, respondent made an emergency delivery of fuel oil to Claude S. Stanton, 5400 Galena Place, N. W., Washington, D. C., in the amount of 61 gallons. Said delivery was in violation of Section 1394.5666 (a) of Ration Order No. 11 in that the amount delivered was in excess of 50 gallons of fuel oil.

218. On or about the 21st day of April, 1943, respondent, in violation of Section 1394.5666 (a) of Ration Order No. 11, knowingly made more than one emergency delivery of fuel oil to Claude S. Stanton, 5400 Galena Place, N. W., Washington, D. C.

219. Respondent, in violation of Section 1394.5666 (a) of Ration Order No. 11, knowingly made two emergency deliveries of fuel oil to Edward Burke, 2415 Otis St., N. E., Washington, D. C., during the heating year of 1942-1943, and more specifically on March 19, 1943, and April 20, 1943.

220. Respondent, in violation of Section 1394.5666 (a) of Ration Order No. 11, knowingly made two emergency deliveries of fuel oil to Mrs. Thomas J. Brown, 1345 Franklin Street, N. E., Washington, D. C., during the heating year 1942-1943, and more specifically on March 6, 1943, and April 3, 1943.

221. Respondent, in violation of Section 1394.5666 (a) of Ration Order No. 11, knowingly made two emergency deliveries of fuel oil to Francis C. Boyd, 701 Fourth Street, S. E., Washington, D. C., during the heating year of 1942-1943, and more specifically on March 27, 1943, and April 15, 1943.

222. Respondent, in violation of Section 1394.5666 (a) of Ration Order No. 11, knowingly made two emergency deliveries of fuel oil to Pauline T. Drake, 5215 Cloud Place, N. E., Washington, D. C., during the heating year of 1942-1943, and more specifically on February 25, 1943, and on March 9, 1943.

[fol. 29] 223. Respondent, in violation of Section 1394.5666 (a) of Ration Order No. 11, knowingly made two emergency deliveries of fuel to Mattie Wood, 23 M Street, N. W., Washington, D. C., during the heating year of 1942-1943, and more specifically, on March 28, 1943, and April 21, 1943.

224. Respondent failed, neglected, and refused to deliver to the proper ration board Emergency Receipts received by it as required by Section 1394.5666 (b) of Ration Order No. 11.

C

General Violations

225. Respondent failed, neglected and refused, at all times between the 1st day of October, 1942, and the 2nd day of June, 1943, to keep a record showing each transfer of fuel oil in excess of 10 gallons, the name and address of the transferee, the date of the transfer, the amount of fuel oil transferred, the place where delivered and the number and value of coupons detached or the amount of any ration check received, for such transfer, in violation of Section 1394.5666 of Ration Order No. 11.

226. At all times during the period between the 1st day of October, 1942, and the 2nd day of June, 1943, and in all instances in which respondent delivered fuel oil, respondent failed, neglected, and refused to execute and to have executed, proper delivery receipts as required by Section 1394.-5655 of Ration Order No. 11.

227. At all times during the period between the 1st day of October, 1942, and the 2nd day of June, 1943, and in all instances of transfers to a consumer who had deposited his coupon sheet with respondent as a dealer, respondent failed, neglected, and refused to detach coupons for fuel oil deliveries as required by Section 1394.5653 of Ration Order No. 11.

(c) If the Hearing Commissioner determines that no suspension order should be issued he shall issue an order dismissing the proceeding in which he shall set forth his findings of fact and conclusions of law. The order shall contain a statement of the reasons why a suspension order should not be issued unless such reasons are stated in an opinion accompanying the order.

§ 1300.166 *Consent order.* If the Hearing Commissioner approves an agreement entered into by the Regional Attorney and a respondent with respect to the terms of a suspension order, he shall issue the order agreed upon, and such order shall have the same force and effect as an order issued under § 1300.165.

§ 1300.167 *Hearing and order by Hearing Administrator.* (a) At any time after the service of a notice of hearing and before the service of the suspension order, the Hearing Administrator may direct that the proceedings be brought before him.

(b) Notice that the proceedings are to be brought before the Hearing Administrator shall be served upon the Regional Attorney, the respondent and the Hearing Commissioner.

(c) Proceedings brought before the Hearing Administrator shall be conducted in the same manner as if brought before a Hearing Commissioner.

§ 1300.168 *Incidental provisions in suspension orders:* A suspension order issued under this regulation may contain such provisions as may be deemed appropriate to make effective the regulation or prohibition prescribed in the order.

Suspension Orders on Appeal From Orders of War Price and Rationing Boards

§ 1300.169 *Appeals from orders of Boards* (a) Whenever a right to appeal to a Hearing Commissioner from an order of a War Price and Rationing Board is granted by a rationing order or regulation, such appeal may be taken within the time and in the manner prescribed in such rationing order or regulation.

(b) The appeal shall be heard by the Hearing Commissioner or a presiding officer, and determined by the Hearing Commissioner in the same manner as if it were a proceeding instituted by a notice of hearing issued under § 1300.152.

(c) The Hearing Commissioner may, for good cause shown upon application by the respondent, stay or suspend the operation of an order issued by a War Price and Rationing Board pending the hearing and determination of the appeal.

(d) Any order issued by the Hearing Commissioner upon the determination of the appeal shall supersede the order of the Board from which the appeal was taken.

Appeals to and Review by Hearing Administrator

§ 1300.170 *Appeals from orders of the Hearing Commissioner.* (a) The respondent or the Regional Attorney may appeal to the Hearing Administrator from any order of the Hearing Commissioner issued under this regulation within ten (10) days (or in the case of orders issued in the Territories and Possessions, within thirty (30) days) after service of such order.

§ 1300.171 *Notice of apeal.* (a) The appeal may be taken by serving a notice of appeal on the Hearing Commissioner and the other party to the proceeding and filing a copy of the notice of appeal with proof of such service at the Office of the Hearing Administrator.

(b) The notice of appeal shall contain (1) a reference to the findings of fact and conclusions of law, if any, to which exception is taken, (2) a brief statement of the grounds for such exceptions, (3) the modifications proposed with respect to the order appealed from, and (4) a brief statement of the reasons supporting such modifications.

§ 1300.172 *Stay pending appeal.* The Hearing Administrator may, for good cause shown upon application by the respondent, stay or suspend the operation of an order of a Hearing Commissioner pending the determination of the appeal.

§ 1300.173 *Record on appeal.* The Hearing Commissioner shall, within three (3) days after the receipt of the notice

of appeal, send to the Hearing Administrator the complete record in the case which shall include:

(a) The Notice of Hearing and proof of service thereof;
(b) The transcript of testimony and all exhibits;
(c) The order of the Hearing Commissioner; and
(d) In a case instituted before a Board, the order of the Board.

§ 1300.174 *Briefs.* (a) Any party may submit to the Hearing Administrator a brief in support of or in opposition to the order of the Hearing Commissioner.

(b) All briefs shall be submitted within twenty (20) days (or in the case of orders issued in the Territories or Possessions within forty (40) days) after service of the order appealed from. Two (2) copies of the brief shall be filed with the Hearing Administrator and a copy thereof served upon the opposing party at or before the time of filing.

(c) Briefs may be filed after the time prescribed by paragraph (b) of this section only with the permission of the Hearing Administrator.

§ 1300.175 *Order on appeal.* (a) The Hearing Administrator may affirm, reverse or modify the order of a Hearing Commissioner or direct that a further hearing be held thereon.

(b) The Hearing Administrator shall issue his order on appeal within a reasonable time after the filing of the notice of appeal. The order may be accompanied by an opinion of the Hearing Administrator, setting forth the reasons for the action taken.

(c) Copies of the order on appeal shall be served on the respondent and the Regional Attorney.

§ 1300.176 *Review on initiative of Hearing Administrator.* (a) If neither the Regional Attorney nor the respondent appeals from the order within the time prescribed in § 1300.170, the Hearing Administrator may review the case on his own motion.

(b) The Hearing Administrator shall initiate a review under subsection (a) of this section by serving a notice of

intention to review on the Regional Attorney and respondent.

(c) A review proceeding under this section shall be conducted in the same manner as an appeal under § 1300.170 except that briefs shall be filed within 15 days (or in the [fol. 18] case of orders issued in the Territories and Possessions, within thirty-five (35) days) after the service of notice of intention to review.

§ 1300.177 *Petition for reconsideration or order of Hearing Administrator under* § 1300.167. (a) Any party may file with the Hearing Administrator a petition for reconsideration of an order issued by the Hearing Administrator under § 1300.167.

(b) The petition for reconsideration shall be served and filed in the same manner as a Notice of Appeal under § 1300.171, and such petition shall conform to the requirements for notices of appeal prescribed in § 1300.171 (b). Proceedings on such petition shall be the same as on an appeal under § 1300.170.

Miscellaneous

§ 1300.178 *Service of papers.* Notices, orders and other process and papers may be served personally or by leaving a copy thereof at the residence or the principal office or place of business of the person to be served; or by registered mail or by telegraph. When service is made personally or by leaving a copy at the residence or the principal office or place of business, the verified return of the person serving or leaving the copy shall be proof of service. When service is by registered mail or telegraph the return post office receipt or telegraph receipt shall be proof of service.

§ 1300.179 *Office hours of Office of Hearing Commissioners and Hearing Administrators.* The Offices of the Hearing Administrator and the Hearing Commissioners shall be open, on weekdays, from 9 a. m. until 5 p. m. and on Saturdays from 9 a. m. until 1 p. m. Any person desiring to file papers, at any time other than the regular hours stated, may file a written application with the appropriate Hearing Commissioner, or the Hearing Administrator if such papers are to be filed with him, requesting permission therefor.

§ 1300.180 *Definitions.* As used in this procedural regulation, unless the context otherwise requires, the term:

(a) "Act" means the Act of June 28, 1940 (54 Stat. 676) as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act (56 Stat. 176), 50 USCA (App.) section 633.

(b) "Hearing Administrator" means the Hearing Administrator of the Office of Price Administration.

(c) "Hearing Commissioner" means the Chief Hearing Commissioner of the Office of Price Administration for the Region in which the proceeding is instituted or such Hearing Commissioner as may be authorized to determine a proceeding held pursuant to this procedural regulation.

(d) "Rationing order or regulation" means any order or regulation of the Office of Price Administration issued pursuant to War Production Board Directive No. 1 as supplemented or Food Directive 1 of the Secretary of Agriculture or pursuant to any other delegation of authority conferred by section 2 (a) of the Act.

(e) "Regional Attorney" means the Regional Attorney for the region in which the violation involved in the proceeding occurred, or an attorney authorized to act for the Regional Attorney in any proceeding conducted pursuant to this regulation.

(f) "Suspension order" means an order which regulates or probibits, for a period, the sale, transfer, delivery or other disposition or the acquisition or use of commodities or facilities, and which is issued against a person who has acted in violation of a rationing order or regulation.

§ 1300.181 *Effective date.* Procedural Regulation No. 4 (§§ 1300.151 to 1300.181 inclusive) shall become effective on 12:01 a. m. on February 15, 1943. It governs all proceedings in cases instituted on and after that date. Unless the Hearing Administrator otherwise directs, it shall also govern all further proceedings in cases then pending; *Provided, however,* That the procedure which was formerly applicable shall govern review of orders issued prior to February 15, 1943, and the provisions establishing such procedure are continued in effect for this purpose.

Issued this 6th day of February 1943.

Prentiss M. Brown, Administrator.

[fol. 19] EXHIBIT "2" TO COMPLAINT

UNITED STATES OF AMERICA, OFFICE OF PRICE ADMINISTRATION

Docket No. 2210:20607

Matter of L. P. STEUART & BRO., INC., a Corporation

Proceedings to determine whether a suspension order should be issued

NOTICE OF HEARING

To: L. P. Steuart & Bro., Inc., 138 Twelfth Street, N. E., Washington, D. C.

You Are Hereby Given Notice that you are charged with having violated the provisions of Ration Order No. 11, Fuel Oil Rationing Regulations.

The specific violations of said Ration Order No. 11 with which you are charged are set forth in the attached Exhibit I, Specification of Charges, the contents of which are hereby referred to and by such reference made a part hereof.

You are further notified that a hearing in this matter will be held at 10 o'clock in the forenoon on the 19th day of August, A. D. 1943, before a Hearing Commissioner of the Office of Price Administration. Said hearing will be held at Municipal Court Building—Criminal Division, Fifth Street, between E and F Streets, N. W., Washington, D. C. The hearing will be conducted in accordance with the provisions of Procedural Regulation No. 4, a copy of which is attached to this notice, and served herewith.

The purpose of the hearing will be to provide the Hearing Commissioner with information from which to determine whether a suspension order shall be issued prohibiting you from receiving any deliveries or transfers of or using Fuel Oil or any other products, commodities or facilities which may now or hereafter be rationed by the Office of Price Administration or prohibiting you from selling, transferring, delivering or otherwise dealing in Fuel Oil or any other products, commodities or facilities which may now or hereafter be rationed by the Office of Price Administration, or both, for such period of time as may be deemed appropriate in the public interest, and to conserve the supply of such products, commodities or facilities for military and essential civilian uses.

You may appear at the hearing and offer evidence in your behalf personally or by counsel of your own choosing. In [fol. 20] the event that you fail to appear at the hearing the charges will be deemed admitted for the purposes of the hearing and the hearing commissioner may take such action as may be warranted in the matter.

Walter Gelihorn, Regional Attorney, Region II, Office of Price Administration. By (S.) Carl W. Berueffy, Chief Enforcement Attorney, District of Columbia District Office, 5601 Connecticut Avenue, N. W., Washington, D. C.

Notice. Respondents are entitled to process to compel the attendance of witnesses at the hearing. Subpoenas are issued in accordance with the provisions of Procedural Regulation No. 4. All applications for subpoenas must be filed in writing with Harry B. Chambers, Chief Hearing Commissioner, Office of Price Administration, Empire State Building, New York, New York.

[fol. 21] EXHIBIT I TO NOTICE OF HEARING

Specification of Charges

A

Violations of Section 1394.5707

Respondent corporation was at all times mentioned herein, and more specifically between the 2nd day of November, 1942, and the 28th day of May, 1943, a dealer in fuel oil conducting its business of such fuel oil dealer within the Limitation Area, as defined in Section 1394.5001 (a) (19) of Ration Order 11, and maintaining its principal office and place of business at and within the District of Columbia. Respondent, at each of the times hereinbelow set forth, accepted transfers of fuel oil from Petrol Corporation. Respondent did not at the time of said transfers, or any of them, deliver in exchange for the fuel oil so transferred to it valid ration coupons or any other ration evidences equal in amount of gallonage value to the amount of fuel oil transferred, either at the time of such transfer, or within five days prior to said transfer, or within fifteen

days after such transfer, or at any other time. In accepting each of said transfers of fuel oil without the exchange of valid coupons or other ration evidences, respondent violated Section 1394.5707 of Ration Order No. 11, and each of said acceptances of fuel oil as aforesaid is hereby alleged as a separate and independent violation; said violations constitute Charges 1 to 187 (both inclusive) of this Specification of Charges. That the time and amount of fuel oil delivered in each of said transactions are more specifically set forth in the following table of violations (all of the matters hereinabove set forth being incorporated by reference in each of the following charges):

[fols. 22-24]

Charge Number	Date	Invoice Number	Gallons Delivered
1	November 2, 1942	A-14313	10,978
2	November 3, 1942	15327	7,962
•	• • • •	• •	•

[fol. 25] (Charges 3 to 187, inclusive, are set forth in the same manner as Charges 1 and 2, and relate to purchases from November 4, 1942, to May 28, 1943, both dates inclusive.)

B

Sales to Consumers in Violation of Section 1394.5652 (a)

188. Respondent sold and delivered 328.640 gallons of fuel oil to consumers between the 1st day of October, 1942, and the 2nd day of June, 1943, without collecting in exchange therefor valid ration coupons or other evidences as required by Section 1394.5652 (a) of Ration Order 11. The time and place of said sales, and the names of such persons to whom said fuel oil was sold cannot be set forth with any greater particularity for the reason that the same are unknown to the Office of Price Administration, but all of said transactions are well known to the officers and employees of respondent corporation.

189. On or about the 22nd day of January, 1943, respondent sold and delivered to P. Paterno, 221 Eighth Street, S. E., Washington, D. C., 240 gallons of fuel oil without requiring in exchange therefor valid ration coupons or other evidences, in violation of Section 1394.5652 (a) of Ration Order No. 11.

190. On or about the 19th day of April, 1943, respondent sold and delivered to B. E. Davis, 829 Twentieth Street, N. E., Washington, D. C., 100 gallons of fuel oil without requiring in exchange therefor valid ration coupons or other evidences, in violation of Section 1394.5652 (a) of Ration Order No. 11.

191. On or about the 20th day of January, 1943, respondent sold and delivered to R. T. Leslie, 13 East Melrose Street, Chevy Chase, Maryland, 60 gallons of fuel oil without requiring in exchange therefor valid ration coupons or other evidences, in violation of Section 1394.5652 (a) of Ration Order No. 11.

192. On or about the 15th day of March, 1943, respondent sold and delivered to Foster D. Shaver, 58 Girard Street, N. E., Washington, D. C., 72 gallons of fuel oil without requiring in exchange therefor valid ration coupons or other evidences, in violation of Section 1394.5652 (a) of Ration Order No. 11.

193. On or about the 4th day of May, 1943, respondent sold and delivered to Ray Davis, 4347 Sixteenth Street, N. E., Washington, D. C., 100 gallons of fuel oil without requiring in exchange therefor valid ration coupons or other evidences, in violation of Section 1394.5652 (a) of Ration Order No. 11.

[fol. 26] 194. On or about the 18th day of May, 1943, respondent sold and delivered 91 gallons of fuel oil to William Doeller, 1314 Twenty Eighth Street, N. W., Washington, D. C., without requiring in exchange therefor valid ration coupons or other evidences, in violation of Section 1394.5652 (a) of Ration Order No. 11.

195. On or about the 20th day of May, A. D. 1943, respondent sold and delivered 109 gallons of fuel oil to William Doeller, 1314 Twenty Eighth Street, N. W., Washington, D. C., without requiring in exchange therefor valid ration coupons or other evidences, in violation of Section 1394.5652 (a) of Ration Order No. 11.

196. On or about the 16th day of April, 1943, respondent sold and delivered to John F. Hughes, 2005 Glenn Ross Road, Silver Springs, Maryland, 100 gallons of fuel oil without requiring in exchange therefor valid ration coupons

or other evidences, in violation of Section 1394.5652 (a) of Ration Order No. 11.

197. On or about the 7th day of May, 1943, respondent sold and delivered to D. Ketchum, 4807 W Street, S. E., Washington, D. C., 100 gallons of fuel oil without requiring in exchange therefor valid ration coupons or other evidences, in violation of Section 1394.5652 (a) of Ration Order No. 11.

198. On or about the 10th day of April, 1943, respondent sold and delivered to George Cooper, 2517 Bennings Road, N. E., Washington, D. C., 92 gallons of fuel oil without requiring in exchange therefor valid ration coupons or other evidences, in violation of Section 1394.5652 (a) of Ration Order No. 11.

199. On or about the 14th day of June, 1943, respondent sold and delivered 100 gallons of fuel oil to T. B. Rice, 1444 Channing Street, N. E., Washington, D. C., without requiring in exchange therefor valid ration coupons or other evidences, in violation of Section 1394.5652 (a) of Ration Order No. 11.

200. On or about the 2nd day of February, 1943, respondent sold and delivered 78 gallons of fuel oil to William Stuart Nelson, 13 R Street, N. W., Washington, D. C., without requiring in exchange therefor valid ration coupons or other evidences, in violation of Section 1394.5652 (a) of Ration Order No. 11.

201. On or about the 19th day of February, 1943, respondent sold and delivered to Ruth E. Moses, 1327 Q Street, N. W., Washington, D. C., 162 gallons of fuel oil, and accepted in exchange therefor 18 Period "#3" Coupons, which were not on said date valid ration coupons, in violation of Section 1394.5652 (c) of Ration Order No. 11.

202. On or about the 24th day of December, 1942, respondent sold 50 gallons of fuel oil to Arthur C. Ward, 2753 Fourth Street, N. E., Washington, D. C., and accepted in exchange therefor 5 Period "3" coupons, which were not on said date valid ration coupons, in violation of Section 1394.5652 (c) of Ration Order No. 11.

203. On or about the 23rd day of December, 1942, respondent sold and delivered to Foster D. Shaver, 58 Girard

Street, N. E., Washington, D. C., 40 gallons of fuel oil and accepted in exchange therefor 4 Period "#3" Coupons, which were not on said date valid ration coupons, in violation of Section 1394.5652 (c) of Ration Order No. 11.

[fol. 27] 204. On or about the 7th day of February, 1943, respondent sold and delivered to Foster D. Shaver, 58 Girard Street, N. E., Washington, D. C., 70 gallons of fuel oil, and accepted in exchange therefor 7 Period "5" Coupons, which were not on said date valid ration coupons, in violation of Section 1394.5652 (c) of Ration Order No. 11.

205. On or about the 17th day of February, 1943, respondent sold and delivered to Mary A. Queen, 546 Twenty Fourth St. N. E., Washington, D. C., 45 gallons of fuel oil, and accepted in exchange therefor 3 Period "5" Coupons and 2 Period "2" Coupons, neither of which were on said date valid ration coupons, in violation of Section 1394.5652 (c) of Ration Order No. 11.

206. On or about the 29th day of December, 1942, respondent sold and delivered to F. S. Sennewald, 1812 B Street, S. E., Washington, D. C., 90 gallons of fuel oil, and accepted in exchange therefor 8 Period "1" Coupons and 1 Period "3" Coupon none of which were on said date valid ration coupons, in violation of Section 1394.5652 (c) of Ration Order No. 11.

207. On or about the 16th day of February, 1943, respondent sold and delivered to F. S. Sennewald, 1812 B Street, S. E., Washington, D. C., 20 gallons of fuel oil, and accepted in exchange therefor 2 Period "5" Coupons, which were not on said date valid ration coupons, in violation of Section 1394.5652 (c) of Ration Order No. 11.

208. On or about the 1st day of February, 1943, respondent sold and delivered to Nema Shadid, 1537 Massachusetts Avenue, S. E., Washington, D. C., 40 gallons of fuel oil, and accepted in exchange therefor 4 Period "2" Coupons, which were not on said date valid ration coupons in violation of Section 1394.5652 (c) of Ration Order No. 11.

209. On or about the 11th day of May, 1943, respondent sold and delivered to W. W. Warfield, Jr., 826 21st Street, N. E., Washington, D. C., 64 gallons of fuel oil, and accepted in exchange therefor 7 Period "4" Coupons, which were

not on said date valid ration coupons, in violation of Section 1394.5652 (c) of Ration Order No. 11.

210. On or about the 1st day of March, 1943, respondent sold and delivered to Levi G. Pratt, 3605 South Dakota Avenue, N. E., Washington, D. C., 97 gallons of fuel oil, and accepted in exchange therefor 10 Period "5" Coupons, which were not on said date valid ration coupons, in violation of Section 1394.5652 (c) of Ration Order No. 11.

211. On or about the 6th day of October, 1942, respondent sold and delivered to R. E. McAllister, 1708 D Street, N. E., Washington, D. C., 60 gallons of fuel oil, and accepted in exchange therefor 6 Period "2" Coupons, which were not on said date valid ration coupons, in violation of Section 1394.5652 (c) of Ration Order No. 11.

212. On or about the 29th day of December, 1942, respondent sold and delivered to R. E. McAllister, 1708 D Street, N. E., Washington, D. C., 162 gallons of fuel oil, and accepted in exchange therefor 9 Period "3" Coupons and 9 Period "4" Coupons, none of which were on said date valid ration coupons, in violation of Section 1394.5652 (c) of Ration Order No. 11.

[fol. 28] 213. On or about the 19th day of December, 1943, respondent sold and delivered to F. B. Ruff, 818 L Street, N. E., Washington, D. C., 9 gallons of fuel oil, and accepted in exchange therefor 1 Period "3" Coupons, which was not on said date a valid ration coupon, in violation of Section 1394.5652 (c) of Ration Order No. 11.

214. On or about the 25th day of February, A. D. 1943, respondent sold and delivered to F. B. Ruff, 818 L Street, N. E., Washington, D. C., 50 gallons of fuel oil, and accepted in exchange therefor 5 Period "5" Coupons, which were not on said date valid ration coupons, in violation of Section 1394.5652 (c) of Ration Order No. 11.

215. On or about the 4th day of March, 1943, respondent sold and delivered to William J. Nalley, 3200 Rhode Island Avenue, Mt. Ranier, Maryland, 225 gallons of fuel oil without requiring in exchange therefor valid ration coupons or other evidence, in violation of Section 1394.5652 (a) of Ration Order No. 11.

216. On or about the 4th day of March, 1943, respondent made an Emergency delivery of fuel oil to Claude S. Stan-

[fol. 30] EXHIBIT "4" TO COMPLAINT

UNITED STATES OF AMERICA, OFFICE OF PRICE ADMINISTRATION, OFFICE OF ADMINISTRATIVE HEARINGS, REGION II, NEW YORK, NEW YORK

Docket No. 40 S11 NY

Matter of L. P. STEUART & BRO., INC., a Corporation, Respondent

Proceedings to Determine Whether a Suspension Order Should be Issued

SUSPENSION ORDER AND OPINION

This matter was heard in Washington, D. C. on August 31, September 1, 18, 20 and the final arguments were presented to the Acting Hearing Commissioner on the 22nd day of October, 1943. The original notice of hearing was served on respondent on August 9th for hearing on August 19th and the hearing was continued until August 31st. The hearing was conducted in accordance with Procedural Regulation No. 4. The Regional Attorney was represented by John L. Laskey, District Enforcement Attorney and Carl W. Beruffy, Assistant Enforcement Attorney of the District of Columbia District Office. Respondent appeared by its officers and agents and was represented by Renah F. Camalier, Esq., its attorney.

Respondent is a Delaware corporation and is one of the largest dealers in fuel oil, operating in the metropolitan area comprising the District of Columbia and surrounding territory with its principal place of business in Washington. Respondent is charged with having violated the provisions of Ration Order No. 11, Fuel Oil Rationing Regulations. The notice of hearing which is part of the record, contains 227 specific charges of violations which may be divided into three groups as follows:

1. The purchase of fuel oil without transferring rationing evidence.
2. The sale of fuel oil without requiring the delivery of valid rationing evidence.
3. The failure of respondent to comply with the requirements of the regulation with respect to the keeping of records.

[fol. 31] The hearing consumed four and one-half days of testimony and argument in support of and in defense of the charges. In addition thereto, the Office of Price Administration and the respondent each submitted written briefs.

At the outset of the hearing respondent raised the question as to the validity of suspension proceedings and of the power of the Acting Hearing Commissioner, not only to conduct the hearing, but to issue a suspension order. This question is one of constitutional law which the Acting Hearing Commissioner has no jurisdiction or authority to determine. The respondent was advised that the hearing was being held under Procedural Regulation No. 4 prescribed by the Office of Price Administration which safeguards the rights of respondent and accords respondent due process of law. Further comment upon the objection raised by the respondent would serve no useful purpose.

At the conclusion of the hearing respondent made a motion stating that the charges had not been proved and that the same should be dismissed. Respondent desired to present argument in support of this motion. The Acting Hearing Commissioner wanted an opportunity to read the record before passing on the motion as it embraced the entire matter in every phase. The findings of fact and the conclusions of law hereinafter set forth may therefore be considered both as a determination of the motion to dismiss, and the decision of the entire matter.

Findings of Fact

From the evidence presented at the hearing, the facts are found as follows:

1. *Business of Respondent*

Respondent is engaged in the business of distributing fuel oil and maintains in the District of Columbia large storage and delivery facilities and distributes from them fuel oil to a large number of consumers. It was estimated [fol. 32] that it distributes about 8% of the fuel oil delivered to consumers within the metropolitan area of the City of Washington. During the heating season of 1942-43, respondent was actively engaged in the distribution of fuel oil after Ration Order No. 11 went into effect and from

its operations the charges in this matter arose. The officers and employees of respondent responsible for its operations were well acquainted with the ration program. Beyond question respondent, through its officers, was entirely conversant with the rules and regulations applying to it as a fuel oil distributor.

2. Unauthorized Receipt of Fuel Oil

The Government charged respondent with accepting fuel oil from the Petrol Corporation without transferring ration coupons or other evidences in exchange therefor. The specifications of charges set forth the deliveries, when the respondent accepted the transfer of given amounts of fuel oil, on 187 specifically named occasions. It was stipulated with respect to each of said deliveries that the delivery was made without the exchange of ration currency or fuel oil coupons. In each instance the delivery was made into a truck of respondent from tanks located within the District of Columbia. Between October 1, 1942 and June 2, 1943 respondent sold and delivered to consumers 5,548,972 gallons of fuel oil. The fuel oil coupons and other evidences collected by respondent during the heating season of 1942-43 were held by it and were not used in accordance with the provisions of Ration Order No. 11 and were never surrendered by it for any purpose. Respondent denied a violation of said ration order on the theory that the oil obtained from Petrol Terminal was oil of respondent and that the surrender of ration evidence was not required by the regulations. Respondent, however, did not register the oil as its property or as in its possession at the beginning of the rationing of same. The second contention of respondent is that if its failure to surrender ration evidence was a violation or series of violations that it was the result of an honest mistake. The regulations specifically [fol. 33] forbids the acceptance of a transfer of fuel oil without the exchange of coupons. There is no ambiguity in the provisions of the regulation. Where there is an ambiguity and there is no reasonable means of obtaining the correct interpretation, honest mistake may be pleaded in extenuation. A telephone call either to the National or District Office of Office of Price Administration would have readily obtained the answer to any question and cleared any doubt which occurred to respondent. The third con-

tention of respondent is in effect that even if guilty of the violations of the regulations by failing to surrender coupons, it interfered in no manner with the rationing program and resulted in detriment to no one, injured no one and did not benefit the respondent. The third contention cannot be accepted as respondent is not permitted to set itself up as the judge of the necessity of the ration order's requirements. It is not for it to determine that certain requirements are useless and can therefore be disregarded with impunity. The charges contained in the specifications, 1 to 187, are sustained. Respondent was guilty of receiving the transfer of fuel oil in violation of the regulation.

3. *Sale of Oil Without Coupons*

The evidence to support the charges that respondent sold fuel oil without requiring the exchange of valid ration coupons is based upon (a) lack of sufficient coupons to account for its sales of fuel oil, (b) specific instances where fuel oil was delivered without exchange of coupons, (c) instances where deliveries were made for invalid coupons, and (d) instances where fuel oil was delivered in exchange for illegally accepted emergency delivery certificates.

The Government charged that respondent sold 328,000 gallons of fuel oil to consumers without requiring valid ration coupons in exchange therefor. In support of this charge, evidence was introduced of a count of more than 600,000 loose coupons collected by respondent during the heating season of 1942-43 made by a staff of employees furnished by the Office of Price Administration. The testimony of the young women who participated indicated that [fol. 34] this count was conducted in a rather loosely controlled manner, certainly, in a manner which does not inspire confidence in the accuracy of the results. Upon a recount of almost 50% of the coupons by an independent auditor and his staff, inaccuracies were shown to have occurred in the first count so glaring as to practically destroy the credibility of the original count. The contention of the Office of Price Administration that an estimated 328,000 gallonage shortage existed was not established by the evidence. Doubtless, some shortage in ration evidence occurred, the amount of which cannot be definitely ascertained from the evidence and it is too questionable from which to draw an inference that respondent wilfully or negligently

transferred fuel oil for which it failed to receive fuel oil coupons.

In addition to the shortage, the Office of Price Administration charged 35 specific deliveries of fuel oil in violation of the regulations. These charges were based upon the records obtained from respondent which were introduced in evidence and were attempts to show deliveries of oil without the exchange of coupons; deliveries in exchange for invalid coupons; and deliveries upon illegally accepted emergency certificates. Some of these charges the Office of Price Administration failed to sustain by uncontroverted evidence. In fact, the consumers in several instances contradicted the testimony of the Office of Price Administration in support of these charges, and the general manager for respondent categorically denied others. However, there were admissions by the general manager in a number of these instances which showed that respondent had delivered small quantities of fuel oil in exchange for invalid coupons and that on at least three occasions small quantities of fuel oil had been delivered without the exchange of any coupons. The first on the ground that it was necessary to violate either the rationing regulation or violate the regulation of the Office of Defense Transportation requiring it to conserve gasoline and tires in making its deliveries of fuel oil. Respondent admitted that the fuel oil ration regulation was violated by it in its endeavor to comply with the regulation [fol. 35] issued by the Office of Defense Transportation. From all the evidence introduced as to the shortage of fuel ration evidence obtained by respondent; from the evidence in support of the specific charges of violations, including the admissions of violations of the fuel oil regulation made by the manager of the respondent, it is impossible to conclude that respondent wilfully disregarded the fuel oil ration regulations and sold fuel oil without the collection of proper ration evidence except in a few instances which to it were violations on justifiable excuses. It is quite evident that respondent did attempt to collect and actually did collect ration coupons for most of the fuel oil delivered by it to consumers during the 1942-43 heating season. Respondent, however, through its admissions, has shown a callous disregard of its own responsibility. It failed in the duty assumed by it in the distribution of fuel oil when restrictions were necessitated by war emergency conditions; Respondent

cannot decide at what times the *re* restrictions are applicable to it and when they may be disregarded. No respondent can use as a valid defense mistakes on the part of its employees. Mistakes of employees can be used only to show that respondent's acts were not intentional. They have the same effect as intentional violations in disrupting the equitable distribution of oil under the rationing system and are the responsibility of respondent which cannot carelessly be tossed aside.

4. *Record Keeping Requirements*

Respondent is charged with its failure to keep records which comply with the requirements of Fuel Oil Ration Order No. 11. There is no doubt that the records of respondent were not as full and complete as required by the regulations. Respondent's failure to place its coupon stamps on gummed sheets and its failure to keep a permanent record of deliveries of oil which it claims to have kept upon the coupon stubs which were later returned to consumers are two instances of respondent's disregard of the rationing regulations. However, the regulations do not [fol. 36] prescribe any specific method of keeping records which must be followed by fuel oil dealers. When the impact of rationing of fuel oil came and threw on the dealers added burdens, only reasonable requirements as to record-keeping were demanded and made part of the regulations. Respondent's excuse for not complying with these reasonable requirements was a shortage of competent man-power. Although the difficulties which beset respondent were great, the same difficulties, coming from the lack of competent help, were common to all the industry. It is very much doubted that respondent put forth a reasonable effort to comply strictly with the provisions of the regulations in maintaining its records. Records which are sufficient for respondent's own information may prove wholly inadequate for the purpose of showing compliance on its part with the provisions of rationing the product it distributes. While the Acting Hearing Commissioner is resolving the benefit of the doubt in respondent's favor on this charge, he is inclined to censure the manager of respondent for his shortcomings in this as well as in other particulars where he failed to properly discharge the trust imposed in him.

5. *Is Respondent's Business Essential*

It is contended by the Office of Price Administration that respondent's facilities and business could safely be dispensed with in the Washington metropolitan district without causing undue hardship to the public. In support of this contention, evidence was adduced of a survey made as to fuel oil suppliers located in and near the District of Columbia. The conclusion reached by the witnesses who conducted this survey was that a suspension of respondent's right to continue in the fuel oil distribution would not be against the public interest. There was equally competent testimony from others engaged in the fuel oil industry, who have first-hand knowledge of the same in the district that respondent serves, whose opinions were equally strong that the suspension of respondent would cause undue hardship and that the suspension of respondent's operations would not be in the public interest. At best, the most [fol. 37] that can be said about this phase of the matter as presented at the hearing is that equally competent men are not in agreement as to respondent's essentiality to the public. The conclusion, however, of the Acting Hearing Commissioner from all the evidence presented at the hearing does not require a decision to be reached on this question. What the economic effect of a suspension might be is at best a matter of opinion. Unless respondent has shown itself wholly untrustworthy to continue to enjoy the conditional right of engaging in rationing the right should not be suspended. An order which will require better compliance with the rationing regulations is the proper goal to be reached, rather than run the risk of injury to the public by taking away respondent's right to continue in the rationing program.

In addition to the foregoing, the evidence showed the difficulties of respondent, its man-power shortage, the panicky demands for fuel oil by the public and restrictions imposed on it by other governmental agencies during the heating season of 1942-43. The difficulties encountered by the respondent during the period covered by the hearing by reason of amendments to the fuel oil rationing regulations and by better distribution during the past summer months should not again be encountered. All fuel oil distributors who suffered from the confusion caused during the early months of fuel oil rationing are now in a better

position to conduct their business in a more orderly fashion. Violations of the regulation heretofore excused or overlooked by reason of those mitigating circumstances cannot again be offered for even technical violations of the rationing regulations in the future.

Conclusions of Law

(1) In accepting the transfer of fuel oil without payment in exchange therefor either valid coupons or other ration evidences, respondent violated the provisions of Section 1394.5707 of Ration Order No. 11.

(2) Respondent by the transfer of fuel oil to consumers without requiring the exchange of ration coupons likewise violated Section 1394.5652 of Ration Order No. 11.

[fol. 38] (3) In accepting coupons which at the time were not yet valid for the delivery of oil, respondent admitted the violation of Section 1394.5458 of Ration Order No. 11.

(4) And although it was not charged and used as a basis of complaint at the hearing, respondent violated Section 1394.5721 of Ration Order No. 11 by its failure as a dealer to properly care for the fuel oil coupons received by it during the heating season of 1942-43.

Congress wisely granted to the President the power to allocate scarce materials during the war emergency. Fuel oil was determined to be a scarce commodity by the responsible officers into whose hands its proper allocation was delegated. Ration Order No. 11 was promulgated by the Office of Price Administration as the best means of properly allocating fuel oil to all consumers within the limitation areas. The Rationing Program in itself placed a burden on the petroleum industry and on all those who distribute fuel oil. Difficulties were generally met by those engaged in the program and fortunately most of them were overcome after the period of confusion was passed. The claim by respondent that all of its difficulties arose from the confusion caused by rationing, by man-power shortage, and by the additional burden of complying with other governmental regulations cannot be accepted as an excuse for respondent's not making a more whole-hearted attempt to comply with the fuel oil regulations. Many doubts as to respondent's good faith have been resolved in its favor dur-

ing the course of the hearing and in the consideration given this matter. By permitting respondent to continue to engage in the sale of oil and in the rationing program, it was accorded a position of high trust from which a reciprocal duty of high fidelity to the public was and is owed by it. Respondent in several particulars has failed in that trust and through negligent conduct has in a measure disqualified itself as a proper participant in the rationing program. Respondent's plea of good faith and that it had complied with the spirit of the rationing program, if not with the actual letter thereof, raises the doubt as to the lack of its [fol. 39] efforts which caused it to fall short of the conduct reasonably to be expected from it as a dealer.

After careful consideration, certain restrictions seem necessary to be imposed on respondent which will, while enabling respondent to continue in business, require it to make certain adjustments in its organization so as to comply with more than the spirit of the rationing program. Respondent's attitude seems to have been, from the evidence of its manager, that its primary concern was to obtain fuel oil and deliver it to its customers during the heating season of 1942-43 and that compliance with the rationing program received secondary consideration. The fullest cooperation of respondent is necessary for the proper distribution of the strategic war commodity it distributes, in the metropolitan Washington district.

For the foregoing reasons it is therefore Ordered that

1. From December 1st, 1943 to December 31, 1944, both dates inclusive, respondent shall not receive the transfer of fuel oil, directly or indirectly, from any source, without the surrender of valid ration currency nor shall it transfer any fuel oil directly or indirectly, to any consumer to whom it made no transfer of fuel oil from July 1st, 1942 to July 1, 1943 and then only on the following conditions:

(a) Respondent shall prepare a list of all consumers including the addresses of same to whom it made transfers of fuel oil from July 1, 1942 to July 1, 1943 and shall deliver a verified copy of said list to the District Enforcement Attorney of the District of Columbia District Office.

(b) Respondent shall furnish to said District Enforcement Attorney satisfactory evidence that it has delivered proper ration coupons or other evidences

in exchange for all oil received by it since June 1, 1943 and shall during the period of this suspension furnish to said Enforcement Attorney on or before the fifth day of each month satisfactory evidence of proper exchange of ration currency for fuel oil received by it during the preceding month.

(c) Respondent shall set up and currently maintain proper records open for inspection during business hours which meet the requirements of Ration Order No. 11 as to records to be kept by dealers.

[fols. 40-48] 2. Notwithstanding the prohibition in paragraph one hereof, respondent may acquire and transfer fuel oil to consumers to whom it transferred fuel oil from July 1, 1942 to July 1, 1943 for valid ration currency or evidences and in strict compliance with Ration Order No. 11.

3. Any terms used in this suspension order that are defined in Ration Order No. 11, Fuel Oil Rationing Regulations shall have the meaning therein given to them.

Issued this 8th day of November, 1943 at Washington, D. C.

(S.) Clifford R. Snider, Acting Hearing Commissioner, Office of Price Administration, Region II.

[fol. 49] EXHIBIT "7" TO COMPLAINT

United States of America

Office of Price Administration

Office of Administrative Hearings

Docket No. 2-1475 A

In the Matter of L. P. STEUART & BRO., INC., a Corporation, Respondent

Proceedings to Determine Whether a Suspension Order Should be Issued

DECISION ON APPEAL

TALBOT SMITH, Hearing Administrator:

Both the respondent and the Regional Attorney by his duly authorized enforcement attorney for the Office of Price

Administration in the District of Columbia have appealed from a suspension order issued in this matter by a Hearing Commissioner on November 8, 1943. Appeal Briefs were filed by both sides, and, the matter was orally argued before the Hearing Administrator on December 18, 1943. The operation of said order has been stayed pending determination of this appeal.

In both notices of appeal and in the briefs each side takes exception to certain findings of fact and conclusions of law of the Hearing Commissioner. The Enforcement Division has requested a modification of the suspension order, while respondent seeks to have the order set aside and the charges dismissed. Respondent also raises issues as to the validity, legality and constitutionality of these proceedings held pursuant to Procedural Regulation No. 4, as amended.

The jurisdictional issue raised by respondent are not matters upon which either the Hearing Commissioner or the Hearing Administrator is empowered to pass. The authority for the conduct of rationing suspension order proceedings is based upon certain Congressional acts (Pub. Law 671, 76th Cong., 54 Stat. 676 as amended by Pub. Law 89, 77th Cong., 55 Stat. 236 and Pub. Law 507, 77th Cong., 56 Stat. 176), executive orders (E. O. 9125, April 7, 1942, E. O. 9280, Dec. 5, 1942), directives (W. P. B. Dir. No. 1 and supplementary W. P. B. directives), and orders of the Administrator of the Office of Price Administration (Gen. Order 46, issued Feb. 6, 1943, 8 F. R. 1771; amended 8 F. R. 2072). It is a well-established rule of law that an administrative tribunal may not pass upon the validity of the statutes or orders that create it. This principle, of course, does not preclude respondent from raising such an issue in a proper forum.

The record in this matter, stripped of the extravagant characterizations attributable to zealous advocacy, clearly establishes the fact that, on the basis of volume of transfers, respondent is the third largest dealer in fuel oil in the City of Washington, D. C., but the total capacity of its fuel oil storage facilities from September 30, 1942 up to July 29, 1943 was only 16,850 gallons according to its own declaration of storage capacity.

Respondent's supplier, Petrol Corporation of Philadelphia, Pennsylvania, during this period had storage facilities in Washington with a capacity of at least 3,405,810

gallons. Through contractual arrangements with Petrol, respondent, as a dealer, became entitled to large quantities of fuel oil from the latter during the 1942-43 heating year.

During the latter part of December 1942 and the early part of January 1943 there was an acute fuel oil shortage in Washington as a result, apparently, of poor distribution of available supplies of fuel oil among dealers. During this period the Petrol Corporation was the only primary supplier with fuel oil on hand in the City of Washington and whatever Petrol had in its Washington storage facilities was made available to only one dealer in the city—the respondent. The demands upon it were, therefore, heavy. In fact at a time when the delivery equipment of other dealers was idle for lack of fuel oil supplies, respondent was ten days behind in its deliveries (except for emergency cases). This unprecedented demand for oil imposed upon the respondent corporation a duty commensurate therewith to distribute such oil only in accordance with the rationing regulations. How well the respondent fulfilled its obligation may now be considered.

[fol. 50] The notice of hearing sets forth 227 specific charges of violations by the respondent. These may be divided into three groups as follows:

1. The acceptance of transfers of fuel oil by respondent without surrendering in exchange therefor valid ration coupons or other evidences.

2. The transfers of fuel oil by respondent to consumers without receiving in exchange therefor valid rationing evidences.

3. Failure of respondent to maintain records of transfers as required by the regulations.

The first set of charges—Nos. 1 to 187 inclusive—in the notice of hearing charged that between October 1, 1942 and June 2, 1943 respondent received transfers of 5,548,973 gallons of fuel oil without surrendering to its supplier, Petrol Corporation, in exchange therefor ration coupons, exchange certificates or any form of ration evidence. There is no dispute as to this fact. It was admitted and stipulated by respondent and remains undenied and unexplained by any of the evidence adduced by respondent. In its brief respondent advances the specious argument that since re-

spondent bought and paid for its fuel oil well in advance of delivery it was receiving its own fuel oil when Petrol Corporation delivered fuel oil from its storage facilities into the tank trucks of respondent. The definitions of the word "transfer" as contained in Ration Order No. 11, Section 1394.5001(a)(35) make clear that the transactions between Petrol Corporation and respondent after the effective date of Ration Order No. 11—October 22, 1942 were subject to all requirements of the rationing regulations, including that of exchanging ration evidences for transfers or deliveries of fuel oil irrespective of the date of any contract therefor. Any doubts on this point will disappear upon reference to Section 1394.5662 of Ration Order No. 11, governing the rights of parties to contracts for transfers of fuel oil.

The acceptance by the respondent, of this enormous gallonage of fuel oil without surrendering ration evidence therefor to its supplier constituted a serious breakdown in the flow-back system which is the heart of the rationing program. As we pointed out in the Petrol Corporation proceedings (Docket No. 2-58A):

> "The successful operation of the rationing plan or system adopted is dependent upon the timely and uninterrupted 'flow-back' of ration evidences. This means that coupons or other evidences must accompany the transfer of fuel oil at each successive level from the consumer, through the dealer, to the primary supplier, who, in turn, must account monthly for his receipts and transfers of fuel oil within the limitation area • • • Rationing to consumers cannot be enforced or controlled unless coupons or other evidences flow upstream to ultimately balance with the total amount of fuel oil transferred. • • •"
>
> "Without timely compliance with these essential control requirements at all stages, the rationing system cannot function effectively, its purposes are thwarted, scarce fuel oil is distributed through uncontrolled channels, the entire ration system is disrupted, and while some consumers get more than they are entitled to receive, others are unable to obtain their full allotments."

Respondent's dereliction in this regard was flagrant and had the most serious consequences. Its violation caused its

supplier, the Petrol Corporation, to become delinquent in its compliance with the rationing program and played a part in the suspension order proceedings brought against the latter. It is possible, moreover, that the respondent's determination not to furnish ration evidences to its supplier accounts in part at least for the complete indifference exhibited by the respondent not only in obtaining, in turn, ration evidences from its consumers, but in the care and recording of such as it did receive. Thus we are brought to a consideration of the second and third groups of charges.

[fol. 51] The second set of charges allege that respondent transferred fuel oil on numerous occasions without requiring the surrender of currently valid ration currency. There was a general charge (No. 188) that respondent had delivered 328,640 gallons between November 2, 1942 and June 2, 1943 without receiving valid ration currency therefor.

This charge was substantiated by the results of a count of more than 600,000 coupons accumulated by respondent last year. When respondent's failure to give Petrol Corporation ration currency for fuel oil transfers came to the attention of the Enforcement Division and an investigation of respondent's activities became necessary, respondent turned over to the District Enforcement attorneys a number of cartons filled with unsorted fuel oil ration coupons of all denominations. Though requested by the Office of Price Administration to assist with these coupons, both in their count and in supervision of the count, respondent refused to do so. Under these circumstances the count was made by employees of the Office of Price Administration.

It is important to note that the counting of the coupons was a burden to be borne entirely by the respondent not only because of its obligation under the regulations to do so but also if it sought to establish a degree of mitigation of the admitted violations set out in charges Nos. 1 to 187 inclusive. Nevertheless respondent neglected its obligation and this burden had to be assumed by the Office of Price Administration for a secondary purpose, viz:—to establish the fact that the respondent's violations were not merely technical but actually made possible the delivery of fuel oil to consumers without the exchange of valid ration coupons. Such deliveries, of course, violated the fundamental principle of the rationing of scarce commodities.

The count of the Office of Price Administration revealed a coupon shortage of 328,640 gallons. This count assigned to each coupon its true value during the period of its validity. That is, it took into account the reduction in value of the 10-gallon coupon to 9-gallon and the 100-gallon coupon to 90 gallons during the third and fourth periods beginning January 4, 1943 and ending March 6, 1943.

Although respondent had possession of the ration evidences prior to May, 1943, had been requested to assist in the count originally and had ample time to conduct the count after the institution of the proceedings, at which time it was apprised of the contents of Charge No. 188, it was not until August 31, 1943, (during the course of the hearing) that respondent undertook to make a count of its own. It then was accorded this opportunity and engaged a certified public accountant for this purpose. Accounting students in his employ and other personnel of his office made a partial check of the count of the Office of Price Administration, counting the contents of 100 of the 211 envelopes containing ration evidences. By the time the respondent's accountant received the coupons they had already been sorted and placed into 211 envelopes. These were in marked contrast to the chaotic condition in which the Office of Price Administration investigators found them.

Respondent's accountant, in his attempt to impeach the count of the Office of Price Administration on the basis of his check of 100 of the 211 envelopes of coupons, claimed that the count was inaccurate in that it failed to properly credit respondent with coupons having a total value of 70,417 gallons. Assuming that the same proportion of error existed in the balance of the envelopes which the accountant did not check, the total error, according to respondent's theory, would be approximately 147,000 gallons. If respondent is given full credit for this alleged error, there would still remain the very substantial shortage of approximately 181,000 gallons.

However, in making his check upon the Office of Price Administration count, the respondent's accountant assigned original values to all of the coupons and failed to make adjustment for the reductions in coupon values during the months of January and February 1943. Thus the accountant's claim that the Office of Price Administration count was inaccurate was predicated upon the assignment of

values to coupons that were not in accord with the facts. The failure to make adjustment in the Period 3 and Period 4 coupons materially increases the 181,000 gallon shortage indicated by respondent's figures.

[fol. 52] We are satisfied from the proof, and have no difficulty in finding, that there was a substantial shortage in respondent's coupons indicating transfers of large quantities of fuel oil to consumers without receiving in exchange therefor valid ration evidences. We cannot agree with the Commissioner below that the Office of Price Administration count was so discredited that it should be entirely disregarded. Whether the shortage totalled 328,640 gallons or some slightly smaller percentage (respondent's accountant indicated that there was a 2 percent difference between his count and that of the Office of Price Administration) is not material in view of the clear proof that substantial quantities of fuel oil were delivered by respondent in clear violation of the rationing regulations.

The second set of charges involved also a series of allegations of specific instances of improper deliveries to consumers. They were taken from among 400 accounts examined during a spot-check of respondent's activities, respondent serving more than 4000 consumer accounts during the period under investigation.

It is not necessary for us to detail each of the specific cases cited in this group of which at least 13 of the violations charged were admitted or proved even though respondent offered certain mitigating explanations with reference to a number of them. The record is replete with proof that respondent did commit, with reference to transfers to consumers, practically every sort of violation known to the regulations—making deliveries for expired coupons, unnatured coupons, no coupons at all and making emergency deliveries in excess of the quantities permitted.

It is true that many of the specific charges in this latter group (from No. 189 to No. 224) if considered apart from the others, may seem relatively unimportant. In some instances, also, plausible explanations were offered. However, it must be remembered that the charges were based upon a sampling of only 10% of respondent's consumer accounts. Taken in the aggregate, we find sufficient evidence in the record to show that in its transfers to consumers respondent violated the rationing regulations to a

marked degree and to that extent thwarted the rationing program.

The third set of charges alleges respondent's non-compliance with the record-keeping requirements of the regulations. Section 1394.5656 of the Fuel Oil Rationing Regulations prior to its amendment on June 30, 1943 provided:

> "Every dealer and supplier shall keep a record of each transfer to a consumer of a quantity of fuel oil in excess of ten (10) gallons. Such record show the name and address of the transferee, the date of the transfer, the amount (and, in the case of residual oil, the grade) of fuel oil transferred and the number and serial numbers of coupons (all delivery receipts) detached. Such records shall be preserved for at least one year. * * *"

Respondent claimed that it complied with the foregoing requirement by noting the information called for on the coupon stubs of the ration holders' coupon books (Form OPA R-1105 C), and that 95% of its customers deposited their ration books with it. Thus by its own admission in at least 5% of the cases it had no records of deliveries as required by Section 1394.5656. However, the more serious defect in respondent's defense to this charge arises from the fact that the stubs of the coupon books deposited with the respondent were required to be returned to the consumers at the end of the heating year or when all coupons were detached. The consumers needed these stubs to obtain their next year's fuel oil rations. The so-called records, then, were the consumers', not the respondent's. They were not in a form in which they could possibly be retained by the respondent for the period of one year as called for by Section 1394.5656. It is clear that this section required a dealer to keep separate records of its own in such form that it could account for each and every one of its consumer deliveries and could retain the same for a period of at least one year. Furthermore, respondent was required to keep records of deliveries from the inception of fuel oil rationing in October of 1942, long before it received the deposits of its customers' ration books. Respondent completely ignored this section of the regulations without which the control necessary to any rationing program is impossible.

[fol. 53] We noted, at the outset of this opinion, the unique position in which the respondent corporation found itself as regards its supply of the rationed commodity it was engaged in selling, we adverted to its unprecedented volume of orders, and we directed our attention to the question of the manner of its performance, in this position of trust and responsibility, of its war-imposed obligations.

We are now in a position to answer that question. The facts are clear. The respondent violated the rationing regulations in every important aspect. The most serious of the violations, are, in fact, admitted. In defense and in mitigation, the respondent takes the singular position that it conceived its first duty to be the supplying of its customers with oil and that conformity with the requirements of the rationing system was subordinate thereto.

Such a position merits careful examination. The philosophy expressed, if sound, is equally applicable to other persons and to other enterprises. In fact, the young business man with his induction notice could with equal logic reply that his duty to his customers came first and conformity with the requirements of the Selective Service Act second. We need not elaborate upon the effect of such courses of conduct upon the prosecution of the war.

The respondent's practice of putting its customers first and its war-time obligations later can neither be condoned nor excused. Upon a reading of the whole record in this case, the conclusion is inescapable that the respondent was seriously deficient in that standard of war-time conduct imposed upon all who deal in commodities so vital and so scarce as to require rationing. We will not speculate as to the motives prompting the respondent's indifference but the lesson of the Golden Calf, found in the Thirty-Second Chapter of the Book of Exodus would seem not inappropriate for the respondent's most serious consideration.

In view of all the circumstances in this matter we agree with the Hearing Commissioner that it is in the interest of national defense and the public welfare that the allocation of fuel oil to respondent as a dealer be decreased so that respondent may be enabled the better to comply with the fuel oil rationing regulations and to carry out its responsibilities as a distributer of a rationed commodity in time of

war. The language of the *Petrol* opinion, *supra*, on this point is appropriate:

> "* * * the plan of rationing adopted by this country presupposes equal trustworthiness in all and permits equal participation, initially, in the handling of scarce commodities. It is only after demonstrated unworthiness or inability that the burden is lessened to that which may safely be borne. In some extreme cases of wanton indifference or malevolent design it may be (and has been) determined that for the duration of the war such individuals should not again be trusted with scarce commodities. For others, those who have been careless, or to some extent indifferent or callous, a period of suspension of the privilege of handling the critically scarce commodity will serve the purpose of enabling the distributor to put his house in order, to set up a system of controls, to indoctrinate inefficient or careless help, and to make himself ready in all respects for a continued assumption of his duty of careful distribution."

We have no way of knowing how many customers the respondent corporation can serve while at the same time faithfully observing the rationing regulations. But we do know from its clearly established violations from the very inception of fuel-oil rationing that the number it then served approached the upper limit of its capacity since the fact is clear that it did not (whether it would not or could not) thereafter both service this number and simultaneously comply with the rationing regulations. Additional customers, then, clearly impose a burden which the respondent cannot bear.

Accordingly, it is Ordered that the suspension order heretofore issued by the Hearing Commissioner be modified to read as follows:

[fol. 54] A. From January 15, 1944 to December 31, 1944, both dates inclusive, respondent shall not, directly or indirectly, recieve delivery of fuel oil for resale or transfer to any consumer, nor shall respondent transfer fuel oil to any consumer, provided that (1) if respondent on or before January 10, 1944 delivers to the District Enforcement Attorney of the District of Columbia District Office a duly verified list of the names and addresses of all con-

sumers to whom respondent sold and delivered fuel oil from October 21, 1941 through October 21, 1942, and (2) if respondent surrenders to the District of Columbia District Office before January 15, 1944 all void or expired ration evidences (or delivery receipts) then in its possession; then and in that event respondent may from January 15, 1944 to December 31, 1944, both dates inclusive, transfer fuel oil to any consumer to whom it transferred fuel oil between October 21, 1941 through October 21, 1942, both dates inclusive, and may receive deliveries of sufficient quantities of fuel oil for purposes of resale and transfer to such consumers.

B. Within thirty (30) days after the receipt of a copy of this order, respondent shall render an accounting to the Director of the District of Columbia District Office (1) for all fuel oil transferred or received by the respondent during the period from 12:01 a. m., October 22, 1942, to the date of such accounting, (2) for all coupons, ration evidences (or delivery receipts) received by or surrendered by the respondent during said period, and (3) showing the quantity of fuel oil (by physical inventory), and coupons, ration evidences (or delivery receipts), on hand and on deposit in its ration bank account as of the date of said accounting.

C. If at any time during the period of this suspension the Petroleum Administrator for War or his duly authorized agent certifies to the Director of the District of Columbia District Office that the fuel oil needs of the District of Columbia or the area served by respondent cannot be met by the supplies and facilities of other suppliers and dealers in this area in addition to those of respondent's as herein restricted, and that it is, therefore, essential to the welfare of the community that the provisions of this order should be modified, and the District Director joins with respondent in a petition requesting such modification, an order of modification may be entered either by the Chief Hearing Commissioner of Region II or the Hearing Commissioner who heard the case below removing the restrictions herein imposed to the extent such action is shown to be necessary to the welfare of the community or the war effort.

D. Any terms used in this suspension order that are defined in Ration Order No. 11, shall have the meaning therein given to them.

Dated: December 31, 1943.

[fol. 55] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed January 7, 1944

Comes now the plaintiff by its attorney, Renah F. Camalier, and respectfuly moves this Honorable Court to enter a Temporary Restraining Order, restraining the defendants and each of them from enforcing or attempting to enforce a certain order of Talbot Smith, Hearing Administrator, Office of Price Administration, dated December 31, 1943 (more fully described in the plaintiff's Complaint herein), or any part or portion of said order.

For grounds in support of the above Motion the plaintiff shows the Court that the said Order by its terms, will, unless the enforcement thereof is restrained, become effective prior to the time required for the defendants' answer herein, and prior to the time when the plaintiff's motion for a preliminary injunction herein can be heard; and that the plaintiff will suffer immediate and irreparable injury, loss, and damage unless the enforcement of the said [fol. 56] order is enjoined and restrained.

For its memorandum of points and authorities in support of the above Motion, the plaintiff refers to its memorandum of points and authorities in support of its motion for a preliminary injunction.

(S.) Renah F. Camalier, 1366 National Press Building, Washington, D. C., Attorney for Plaintiff.

[fol. 57] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION—Filed January 7, 1944

Comes now the plaintiff by its attorney, Renah F. Camalier, and respectfully moves the Court for a Preliminary Injunction, enjoining the defendants *pendente*

lite from enforeing or attempting to enforce a certain order of Talbot Smith, Hearing Administrator of the Office of Price Administration, bearing date December 31, 1943, and more fully described in the Complaint herein.

For grounds in support of the above Motion plaintiff will urge that irreparable injury, loss, and damage will result to the plaintiff if the same Order is enforced, and that said Order by its terms becomes effective in part on January 10, 1944, and as to the remainder on January 15, 1944, both dates being before an adjudication can be had on the complaint herein.

(Sgd.) Renah F. Camalier, 1366 National Press Building, Washington, D. C., Attorney for Plaintiff.

[fol. 58] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

L. P. STEUART & BRO., INC., a Corporation, Plaintiff,

v.

CHESTER BOWLES, Administrator, Office of Price Administration, Federal Office Building No. 1, Washington, D. C.; Robert K. Thompson, District Director, District of Columbia, Office of Price Administration, 5601 Connecticut Avenue, N. W., Washington, D. C.; John L. Laskey, District Enforcement Attorney, District of Columbia, Office of Price Administration, 5601 Connecticut Avenue, N. W., Washington, D. C., Defendants

TEMPORARY RESTRAINING ORDER—Filed January 7, 1944

This cause came on for hearing upon motion of the plaintiff herein for a Temporary Restraining Order, which motion was argued by the attorney for the plaintiff and attorneys for the defendants, and it appearing to the Court that the plaintiff herein is a Corporation, a part of whose business consists of the selling at retail of fuel oil, and it further appearing that there was issued on December 31, 1943, by Talbot Smith, Hearing Administrator of the Office of Price Administration, a certain order reading as fol-

lows (the plaintiff herein being referred to as Respondent in said Order):

A. From January 15, 1944 to December 31, 1944, both dates inclusive, respondent shall not, directly or indirectly, receive delivery of fuel oil for resale or transfer to any consumer, nor shall respondent transfer fuel oil to any consumer, provided that (1) if [fol. 59] respondent on or before January 10, 1944 delivers to the District Enforcement Attorney of the District of Columbia District Office a duly verified list of the names and addresses of all consumers to whom respondent sold and delivered fuel oil from October 21, 1941 through October 21, 1942 and (2) if respondent surrenders to the District of Columbia District Office before January 15, 1944 all void or expired ration evidences (or delivery receipts) then in its possession, then and in that event respondent may from January 15, 1944 to December 31, 1944, both dates inclusive, transfer fuel oil to any consumer to whom it transferred fuel oil between October 21, 1941 through October 21, 1942, both dates inclusive, and may receive deliveries of sufficient quantities of fuel oil for purposes of resale and transfer to such consumers.

B. Within thirty (30) days after the receipt of a copy of this order, respondent shall render an accounting to the Director of the District of Columbia District Office (1) for all fuel oil transferred or received by the respondent during the period from 12:01 a. m., October 22, 1942, to the date of such accounting, (2) for all coupons, ration evidences (or delivery receipts) received by or surrendered by the respondent during said period, and (3) showing the quantity of fuel oil (by physical inventory), and coupons, ration evidences (or delivery receipts), on hand and on deposit in its ration bank account as of the date of said accounting.

C. If at any time during the period of this suspension the Petroleum Administrator for War or his duly authorized agent certifies to the Director of the District of Columbia District Office that the fuel oil needs of the District of Columbia or the area served by respondent cannot be met by the supplies and facilities of other suppliers and dealers in this area in addition

to those of respondent's as herein restricted, and that it is, therefore, essential to the welfare of the community that the provisions of this order should be modified, and the District Director joins with respondent in a petition requesting such modification, an order of modification may be entered either by the Chief Hearing Commissioner of Region II or the Hearing Commissioner who heard the case below removing the restrictions herein imposed to the extent such action is shown to be necessary to the welfare of the community or the war effort.

D. Any terms used in this suspension order that are defined in Ration Order No. II, shall have the meaning therein given to them.

and it further appearing to the Court that the Complaint herein asserts that the aforesaid order and the proceedings upon which it was based are illegal and void and that the Office of Price Administration is without lawful authority to issue such an order, and it further appearing that [fol. 60] the defendants do and will contend herein that the said order and the proceedings upon which it is based are lawful and valid and authorized by statute, executive orders, directives, and regulations, and it appearing that portions of the said order will by its terms become effective on January 10, 1944, and the remainder on January 15, 1944, both dates being prior to the expiration of the time required by the rules of this Court for the filing of an answer, and it further appearing to the Court that the plaintiff may sustain irreparable damage if the said order or any part thereof be enforced prior to the determination by this Court of the issue as to its validity and the authority of the Office of Price Administration to issue such an order, it is, by the Court, this 7th day of January, A. D., 1944

Ordered that the defendants herein, Chester Bowles, Administrator, Office of Price Administration, Robert K. Thompson, District Director, District of Columbia, Office of Price Administration, and John L. Laskey, District Enforcement Attorney, District of Columbia, Office of Price Administration, in their official capacities as aforesaid, their deputies and agents, and each of them be and they hereby are restrained and enjoined from enforcing or at-

tempting to enforce the said order of Talbot Smith, Hearing Administrator, hereinabove set forth, or any part thereof; Provided, That this order shall expire on midnight, January 14, 1944, unless extended for good cause shown or unless the defendants consent that it may be extended for a longer period, and Provided, further, That the plaintiff shall furnish its undertaking, with corporate surety approved by this Court, in the sum of $1,000.00 conditioned for the payment of such costs and damages as may be incurred or suffered by the defendants or any party who may be found by this Court to have been wrongfully enjoined or restrained.

(S.) T. Alan Goldsborough, Justice.

Issued 4:05 P. M.

[fol. 61] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

JOINT AND SEVERAL ANSWERS OF DEFENDANTS—Filed January 14, 1944

Come now the defendants, and each of them, in the above entitled cause, and for their joint and several answer to the complaint herein say:

1. The defendants admit the allegations contained in Paragraph 1 of said complaint.

2. The defendants admit and allege that at all times material to these proceedings the plaintiff was and is engaged in the retail sale of various types of fuel oil and other products. Defendants further allege that on or about the 19th day of October, 1942 pursuant to the authority duly conferred upon him, Leon Henderson, then Administrator of the Office of Price Administration, issued Ration Order No. 11, Fuel Oil Rationing, (7 F. R. 8480) effective October 22, 1942; that at all times since October 22, 1942, the plaintiff herein has been and still is a dealer at retail of fuel oil within the meaning of and subject to the pro-
[fol. 62] visions of said Ration Order No. 11. Defendants deny each and every other allegation set forth in paragraph 2 of the complaint herein.

3. Defendants allege that on February 6, 1943, pursuant to the authority duly conferred on him, Prentiss M. Brown, then Administrator of the Office of Price Administration, issued Procedural Regulation No. 4, effective March 1, 1943 (8 F. R. 1744, 2035), prescribing the procedure for the issuance of rationing suspension orders by the Office of Price Administration. The defendants further admit and allege that exhibit 1 attached to the plaintiff's Complaint is a true and correct copy of Procedural Regulation No. 4.

4. Defendants admit the allegations and averments set forth in paragraph 4 of the plaintiff's Complaint herein. Defendants allege that in each of the acts therein set forth the persons named were acting pursuant to authority validly delegated to them as officers and employees of the Office of Price Administration.

5. Defendants allege that pursuant to said Notice of Hearing a full, fair and impartial hearing was held on August 31, 1943, September 1, 1943, September 18, 1943, September 20, 1943, and October 22, 1943 before Clifford R. Snider, Acting Hearing Commissioner, Office of Price Administration, Region II. On November 8, 1943, the said Hearing Commissioner issued a suspension order and opinion. Exhibit 4 of plaintiff's Complaint is admitted to be a true copy of said suspension order.

6. In accordance with the provisions of said Procedural Regulation No. 4, plaintiff appealed to the Hearing Administrator from the aforesaid suspension order of the Hearing Commissioner. Exhibit 5 is admitted to be a true copy of plaintiff's Notice of Appeal. The defendant, John L. Laskey, in his official capacity, also appealed from the said order of the Hearing Commissioner, in accordance with the provisions of said Procedural Regulation No. 4. Exhibit 6 to plaintiff's Complaint is admitted to be a true copy of his Notice of Appeal. After hearing, the Hearing Ad-
[fol. 63] ministrator on December 31, 1943 issued his Decision on Appeal, modifying the order of the Hearing Commissioner. Exhibit 7 to plaintiff's Complaint is admitted to be a true copy of said Decision on Appeal.

7. Defendants deny each and every allegation set forth in Paragraph 7 of Plaintiff's Complaint herein, and on the contrary allege that the suspension order issued on De-

cember 31, 1942, by Talbot Smith, Hearing Administrator, was and is a valid exercise of the allocation power granted to the President of the United States by the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (Priorities and Allocations Act) (55 Stat. 236), and by Title III of the Second War Powers Act, 1942 (56 Stat. 176, 50 U. S. C. (Supp. II) Sec. 631 et seq.), and delegated to the Office of Price Administration.

8. Defendants allege that the Hearing Commissioner and the Hearing Administrator properly declined to consider the question of lack of statutory authority to issue administrative suspension orders under the aforesaid Acts, upon the ground that such an inquiry was beyond the scope of their authority, preserving to the plaintiff the right to raise said issue in any proper forum.

9. As to the allegations of paragraph 9 of said Complaint, the defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the averments therein and therefore deny the same.

10. As to the matters set forth in Paragraph 10 of the plaintiff's Complaint herein, the defendants allege that the order complained of is a valid exercise of the allocation power and that any injury to the plaintiff therefrom is not injury or damage for which equity will afford relief.

[fol. 64] Wherefore, these defendants pray that this action be in all things dismissed, and that these defendants and each of them be dismissed with their proper costs and disbursements.

Dated January 14, 1944.

(S.) Fleming James, Jr. Director, Litigation Division; (S.) Harry L. Shniderman, Attorney; Office of Price Administration Federal Office Building No. 1, 2nd & D Streets, S. W., Washington, D. C.

(S.) John L. Laskey, District Enforcement Attorney; (S.) Carl W. Berueffy, Attorney.

[fol. 65] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER CONTINUING RESTRAINING ORDER—Filed January 14, 1944

This cause came on for hearing on the motion for a preliminary injunction, and, after argument of counsel for the plaintiff and for the respective defendants on said motion, the Court takes the said motion under advisement; and it appearing to the Court that the temporary restraining order entered herein on, to wit, January 7, 1944, expires on Midnight January 14, 1944, and that this Court may not rule upon the motion herein for a preliminary injunction prior to the expiration of the said temporary restraining order, it is, by the Court this 14th day of January, 1944

Ordered That the date of expiration of the temporary restraining order entered herein the 7th day of January, 1944, against the defendants be, and the same hereby is, extended for 10 days; Provided, That if an order is entered herein on the motion for a preliminary injunction prior to the expiration of 10 days, the said temporary restraining order shall expire upon the entry of the order on said motion.

S/ Jennings Bailey, Justice.

1-14-44.

[fol. 66] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

L. P. STEUART & BRO., INC.,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration, et al.

OPINION—Filed January 21, 1944

The plaintiff is a retail dealer in various types of fuel oil in the District of Columbia and nearby areas; the defendants are the Administrator of the Office of Price Administration and District officials of that Agency.

Proceedings were instituted against the plaintiff in accordance with the regulations of the O. P. A. in which the plaintiff was charged with numerous violations of the regulations of the O. P. A., charging it inter alia with failure to turn over to its supplier coupons required to be delivered by the regulations; with a discrepancy between the coupons which the plaintiff had in its possession as against the amount of fuel sold; and various minor irregularities in the selling of fuel oil. Hearings were had before the Hearing Commissioner who sustained some of the charges, and found in favor of the plaintiff as to others. Hearings were had on appeal to the Hearing Administrator, who sustained all the charges and entered the suspension order of which the plaintiff complains.

[fol. 67] The plaintiff has sued to enjoin the enforcement of the suspension order. A temporary restraining order was issued and the case has come on for hearing on the plaintiff's motion for an injunction pendente lite. At the hearing the defendants moved orally for a summary judgment upon the ground that there are no material issues of fact in dispute.

Section 2(a)(2) of the Second War Powers Act of 1942 provides:

> "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

Section 2(a)(8) authorizes the President to delegate these powers to any department, agency, or officer of the Government.

Under the powers delegated to it, the O. P. A. promulgated numerous regulations including those regulating the allocation and sale of fuel oil and providing for the suspension of allocations of fuel oil to those who failed to comply with its regulations and of the right to sell fuel oil. In the instant case the power of the plaintiff to receive or deliver fuel oil was suspended upon certain conditions for the period from January 15, 1944 to December 31, 1944.

The defendants contend that the O. P. A. has no power to suspend the plaintiff's dealings in fuel oil, that the action of the O. P. A. is a taking of property without due process of law and is not authorized by either the Constitution or by the Act of Congress. But I think that the power to allocate includes the power to re-allocate, or to put an end to an allocation. The power was given to the President to "allocate such material or facilities" (that is those for defense or for private account or for export) "in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense." If the agency which the O. P. A. may authorize to distribute the materials or facilities misuses its authority and privileges and violates [fol. 68] the regulations promulgated for its guidance and control, I see no reason why the O. P. A. should not revoke the allocations to and powers of the agency. If it can do this, it can do the lesser. If it can put an end to the allocation it can suspend them. As has been well said by defendants' counsel in their brief:

"If the rationing regulations provided generally that only those dealers who in the past had observed the rationing regulations were eligible for allocations of rationed commodities * * * there could be little doubt that this provision would be an exercise of the statutory power to allocate and to prescribe the conditions for allocation."

The suspension order in this case is not like the suspension order issued by W. P. B. involved in the case of B. Simon Hardware Co. v. Nelson in the nature of a penalty or punishment for past conduct, but for the protection of the public as to future action, to prevent a continuance of the violations of the regulations of the O. P. A. made for the protection of the public. There can be no question of the necessity of the preservation of those materials which are necessary both to the carrying on of the war and the health and existence of the people of the country, and the powers given to the President and to those whom he has chosen to carry out these objects are necessary and proper in time of war.

I agree in general with the reasoning of the Circuit Court of Appeals of the Fifth Circuit in its opinion recently handed down in thec ase of Brown, Admn. v. Williams, et al.

The plaintiff has argued that this suspension order will interfere with the needs of other agencies of the Government, but apart from any other consideration it is enough to say that none of them has sought to intervene in this case.

The motion of the plaintiff for an injunction pendente lite will be overruled, the temporary restraining order dissolved, and there being no material issue of fact, and no claim in the complaint that there was no substantial evidence to support the findings of the Hearing Administrator, the motion of the defendants for summary judgment will be sustained and the complaint dismisseed with costs.

/s/ Jennings Bailey, Justice.

[fol. 69] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

L. P. STEUART & BRO., INC., a Corporation, Plaintiff,

v.

CHESTER BOWLES, Administrator, Office of Price Administration, Federal Office Building No. 1, Washington, D. C.; Robert K. Thompson, District Director, District of Columbia, Office of Price Administration, 5601 Connecticut Avenue, N. W., Washington, D. C.; John L. Laskey, District Enforcement Attorney, District of Columbia, Office of Price Administration, 5601 Connecticut Avenue, N. W., Washington, D. C., Defendants

JUDGMENT—Filed January 24, 1944

This action came on to be heard before this Court on January 14, 1944 upon plaintiff's motion for an injunction pendente lite, at which time all parties appeared through counsel and were heard.

Upon said hearing plaintiffs and defendants moved orally for summary judgment upon the ground that there were no material issues of fact to be tried and all parties consented that for the purpose of this case all material facts well pleaded in either pleading be taken as true; that there is no claim in the complaint that there was no substantial evidence to support the order of the Hearing Adminis-

trator, and that the order to be entered herein be a final one upon said oral motions of the parties.

[fol. 70] The Court adopts as its Conclusions of Law the opinion filed herein and makes this additional conclusion of law to-wit:

The provisions of Section 1394, 5661, of Ration Order No. 11 do not preclude the issuance of the suspension ordered entered against the plaintiff in this case.

Adjudged and Ordered that the motion for an injunction pendente lite be and the same is denied; and it is further adjudged and ordered

That the temporary restraining order heretofore issued herein on January 7, 1944, be extended until January 26, 1944, at 12:00 midnight, in order to allow plaintiffs time to apply to the United States Court of Appeals for the District of Columbia for an injunction pending appeal herein, and that said temporary restraining order be dissolved at 12:00 midnight on January 26, 1944; unless otherwise ordered by said Court of Appeals and it is further adjudged and ordered

That defendants' motion for summary judgment be and the same is granted and that the complaint herein be and the same is dismissed with costs.

Jennings Bailey, Justice.

Dated: Jany. 24/44.

[fol. 71] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA—Filed January 24, 1944

Notice is hereby given that L. P. Steuart & Bro., Inc., plaintiff herein, hereby appeals to the United States Court of Appeals for the District of Columbia from the final judgment entered in this action on January 24, 1944.

(Sgd.) Renah F. Camalier, 1366 National Press Building, Attorney for the Plaintiff.

Service Acknowledged, January 24, 1944. (S.) Fleming James, Jr., Attorney for all Defendants.

[fol. 72] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER CONTINUING TEMPORARY RESTRAINING ORDER—Filed January 26, 1944

On motion of the attorneys for the plaintiff and the consent of the attorneys for the defendants, it is, by the court, this 26th day of January, 1944,

Ordered that the temporary restraining order entered herein on January 7, 1944, be and the same hereby is continued until such time as the Court of Appeals has heard and determined the appeal from the judgment of this court entered on January 24, 1944.

(S.) Jennings Bailey, Justice.

We consent: (S.) Fleming James, Jr., (S.) Harry L. Shniderman, Attorneys for Defendants.

(Here follows 1 photolithograph, side folio 73)

CIVIL DOCKET
DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

NUMBER	PARTIES	ATTORNEYS	ACTION FOR	TAXED COSTS
22634	L. P. Stewart & Bro, Inc. a corp.	Renah F. Camalier	Injunction	Attorney, Marshal, Clerk, Witnesses, Depositions, Examiner, Ct. Appls.,
	vs.			
	Chester Bowles, Adm, O.P.A	John L. Laskey		
	Robert K. Thompson, O.P.A	" "		
	John L. Laskey, O.P.A	" "		

DATE	PROCEEDINGS	DEPOSITS	FEES	TOTAL
1944	*Deposit for costs by—* Camalier			
Jan 7	Complaint Exhibits "(1)	10—	10.—	10—
" 7	Motion for temporary restraining order & P.I.	filed		
" 7	Motion for preliminary injunction & P.I.			
" 7	Temporary Restraining Order issued			

[fol. 74] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO RECORD—Filed January 29, 1944

It is stipulated by and between the attorneys for the plaintiff, appellant, and the attorneys for the defendants, appellees, that the following are designated by both parties for the record on appeal:

1. The complaint, with all exhibits, namely, 1 to 7, inclusive.

2. Motion for temporary restraining order (without memorandum in support of motion).

3. Motion for preliminary injunction (without memorandum in support of motion).

4. Temporary restraining order entered herein on January 7, 1944.

5. Joint and several answers of all defendants filed herein January 14, 1944.

[fol. 75] 6. Order entered January 14, 1944, continuing temporary restraining order.

7. Opinion of Mr. Justice Bailey entered January 21, 1944.

8. Judgment entered January 24, 1944.

9. Notice of appeal filed herein January 24, 1944.

10. Consent order entered January 26, 1944, continuing temporary restraining order.

11. Docket entries herein.

12. This stipulation as to record.

(Sgd.) Renah F. Camalier, Attorney for L. P. Steuart & Bro., Inc., Plaintiff and Appellant.

(Sgd.) Fleming James, Jr., Harry L. Schniderman, Attorneys for all Defendants, (Appellees).

[fols. 76-77] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 78] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, JANUARY TERM, 1944

* * * * * * * *

Before Honorable Justin Miller, Henry W. Edgerton and Thurman Arnold, Associate Justices

No. 8677

L. P. STEUART & BRO., INC., a Corporation, Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration, et al., Appellees

MINUTE ENTRY OF ARGUMENT—February 4, 1944

Argument commenced by Mr. Renah F. Camalier, attorney for appellant, continued by Mr. Fleming James, Jr., attorney for appellees, and concluded by Mr. Renah F. Camalier, attorney for appellant. Appellant granted permission to file a supplemental brief not exceeding ten pages by February 8th.

* * * * * * * *

[fol. 79] IN THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

L. P. STEUART & BRO., INC., a Corporation, Appellant,

v.

CHESTER BOWLES, Administrator, Office of Price Administration, et al., Appellees

Appeal from the District Court of the United States for the District of Columbia

Mr. Renah F. Camalier for appellant. *Mr. Francis C. Brooke* also entered an appearance for appellant.

Mr. Fleming James, Jr., Director, Litigation Division, Office of Price Administration, with whom *Messrs. Thomas*

*I. Emerson,** Deputy Administrator for Enforcement, *David London,** Chief Appellate Branch, *Harry L. Shniderman,** Attorney, *John L. Laskey,* District Enforcement Attorney, and *Carl W. Berueffy,** Enforcement Attorney, all of the Office of Price Administration, were on the brief, for appellees.

Before Miller, Edgerton, and Arnold, JJ.

OPINION—February 18, 1944

EDGERTON, J.:

This appeal is from the District Court's denial of an injunction to restrain the Office of Price Administration from enforcing a suspension order against appellant.

Appellant is, among other things, a large retail dealer in fuel oil. The Hearing Administrator of the Office of Price Administration found after a full hearing that appellant in violation of rationing regulations accepted great quantities of fuel oil from a supplier without surrendering valid rationing evidence, transferred great quantities to customers without receiving valid rationing evidence, and failed to keep required records. The suspension order forbids appellant to transfer fuel oil to customers or to receive delivery of fuel oil for resale, between January 15 and December 31, 1944; but with a proviso that if appellant furnishes a verified list of its customers during the pre-rationing year (October 21, 1941, to October 21, 1942), and surrenders all void or expired rationing evidence in its possession, it may transfer oil to any consumer whom it served during that year and may receive deliveries for that purpose. The order provides that it may be modified if modification becomes necessary in order to meet the [fol. 80] needs of the area. It also provides for an accounting by appellant of its fuel-oil transactions.

Appellant does not deny that the evidence supported the findings of the Hearing Administrator. The complaint and answer raise no issues of fact. The District Court rendered summary judgment dismissing the complaint, but continued a temporary restraining order pending this appeal.

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* Appeared by authority of the Price Administrator. 7 Fed. Reg. 7910.

Appellant contends that there is no statutory authority for the suspension order. We think the District Court was right in finding such authority in the Second War Powers Act, 1942, which provides in § 2(a)(2): "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."[1] The suspension order is within the President's authority to "allocate."[2] As the District Court observed, the power to allocate includes the power to re-allocate, or to put an end to an allocation. All allocation has positive and negative aspects. What is allocated to some is allocated away from others. An order is equally an allocation whether it prescribes what A shall receive or, as in the case of this suspension order, what B shall not receive. The language quoted from the Second

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[1] 56 Stat. 176, 178, 50 U. S. C. § 633 (Supp. 1942).

The President has delegated to the Office of Price Administration, and it has exercised, the authority to allocate fuel oil. By Executive Order 9125, the President conferred his authority over allocation under § 2(a)(2) of the Second War Powers Act on the War Production Board and confirmed War Production Board Directive No. 1, 7 Fed. Reg. 562, which lodged in the Office of Price Administration the Board's allocation power under the earlier acts. 7 Fed. Reg. 2719, 2720. By Supplementary Directive 1-0, the War Production Board expressly delegated to the Office of Price Administration authority over the rationing of fuel oil. 7 Fed. Reg. 8418. The Office of Price Administration then issued Ration Order 11, which deals in detail with this subject. 7 Fed. Reg. 8480. The Office of Price Administration delegated to its Hearing Administrator and Hearing Commissioners its incidental authority to issue suspension orders. General Order 46, 8 Fed. Reg. 1771. It also adopted procedural regulations governing their issue. Procedural Regulation 4, 8 Fed. Reg. 1744.

[2] *Brown, Administrator* v. *Wilemon*, — F. 2d — (C. C. A. 5th, Jan. 13, 1944).

War Powers Act is substantially the same as that in a previous act[3] under which a number of suspension orders were issued. The practice of issuing such orders was brought to the attention of Congress when the Second War Powers Act was under consideration.[4]

Appellant urges that the suspension order is penal. If this were true it would not be conclusive, since Congress may confer upon administrative officers authority to impose penalties.[5] But appellant contends that Congress has not in fact conferred penal authority upon the Office of Price Administration. For the purpose of the argument only, we accept this contention. It does not aid appellant, for the suspension order is remedial and not penal.

[fol. 81] A penalty is a punishment, an injury inflicted for punitive purposes. Appellant's suspension is undoubtedly an injury, but is not imposed for punitive purposes. It is a direct means to a fairer distribution of the limited supply of oil in accordance with the allocation program. Appellant had shown a strong inclination to disregard that program.[6] It had not merely violated the program but had informed the Hearing Administrator, in effect, that it "conceived its first duty to be the supplying of its customers with oil and that conformity with the requirements of the rationing system was subordinate thereto."[7] This comes to saying that appellant deliberately determined, as a matter of general policy, to meet what it considered the needs of its customers whether or not they had rationing evidence. Since violation of the law was willful, statutory penalties of fine and imprisonment might have been invoked. But instead of seeking to punish, the government sought to prevent. The suspension order is intended to limit, and does limit, appellant's temptation and opportunity to vio-

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[3] Act of May 31, 1941, 55 Stat. 236, which amended the Act of June 28, 1940, 54 Stat. 676.

[4] *Perkins* v. *Brown*, — F. Supp. — (D. C., S. D. Ga., Nov. 15, 1943).

[5] *Lloyd Sabaudo Societa* v. *Elting, Collector of Customs*, 287 U. S. 329, 334.

[6] Appellant's violations of the program were in themselves ample evidence of an inclination to disregard it.

[7] The language is the Hearing Administrator's. Appellant has not questioned its accuracy.

late the rationing program. The order therefore tends, in a most direct way, to promote the program. No doubt it tends also to promote the program in an indirect way by indicating that violation may not pay. But an incidental minatory effect does not turn a remedial order into a penal one. The fact that the suspension order protects the public directly, by allocating oil away from a dealer who is disposed to violate the rationing program and toward other dealers, sharply distinguishes it from fines and penalties.

Hawker v. *New York*[8] illustrates the same general principle. That case involved a New York statute which forbade the practice of medicine to physicians who had committed felonies. A physician contended that it increased his punishment for an offense which he had committed before its passage, and that it was therefore, as to him, *ex post facto* and invalid. The Supreme Court rejected his contention. The Court held that the statute did not impose punishment for the former offense but merely prescribed a qualification for the practice of medicine, since its immediate purpose was to protect the public.[9]

The suspension order might well have been absolute. Instead, it is qualified so as to permit appellant to serve as many of its old customers as it can reach. The qualification cannot harm appellant and does not vitiate the order. Perhaps an arbitrary proviso might vitiate an otherwise valid order, but the actual proviso is not arbitrary. It is related to the rationing program. It will place appellant in a position similar to, though not so good as, that in which it stood when it embarked on its illegal course. Dealings with a limited group of known customers can be more easily conformed to the law, can be more easily policed, and offer less temptation to obtain business by disregarding the law, than unlimited dealings with the public.

[fol. 82] Appellant urges that the order will limit the sources from which government agencies may buy oil, and

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[8] 170 U. S. 189.

[9] Similarly, suspension of members of stock exchanges and the like, for the protection of the public, is not penal. *Wright* v. *Securities & Exchange Commission*, 112 F. 2d 89 (C. C. A. 2d); *Nichols & Co.* v. *Secretary of Agriculture*, 131 F. 2d 651 (C. C. A. 1st); *Nelson* v. *Secretary of Agriculture*, 133 F. 2d 543 (C. C. A. 7th).

will require appellant to discriminate between would-be customers, contrary to earlier orders of general application. If there were a conflict between orders, presumably the later would control. But no order provides that government agencies may buy from dealers who are not authorized to sell, or that dealers must sell to customers who are not authorized to buy. Even if appellant's contentions to the contrary were sound they would not aid appellant, since litigants "to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law." [10]

Affirmed.

[fol. 83] Copy

[File endorsement omitted]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

L. P. STEUART & BRO., INC., a Corporation, Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration, et al., Appellees

Appeal from the District Court of the United States for the District of Columbia

JUDGMENT—February 18, 1944

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

It is further Ordered by the Court that the order of said District Court continuing the temporary restraining order

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[10] *Perkins, Secretary of Labor, v. Lukens Steel Co.*, 310 U. S. 113, 125.

theretofore issued by that court until the determination of this appeal be, and it is hereby, dissolved effective February 25, 1944, on which date the mandate of this Court shall issue.

Dated February 18, 1944. Per Mr. Justice Edgerton.

[fol. 84] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

DESIGNATION OF RECORD—Filed February 21, 1944

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Original transcript of record of proceedings in the District Court of the United States for the District of Columbia, omitting Fuel Oil Rationing Regulations set forth at pages 29 to 134.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's certificate.

Renah F. Camalier, 1366 National Press Building, Washington, D. C. Francis C. Brooke, 1366 National Press Building, Washington, D. C., Attorneys for Appellant.

Service acknowledged—no counter-designation.
(S.) Charles Fahy, Solicitor General.

[fol. 85] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 86] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION FOR OMISSIONS FROM PRINTED RECORD

It is stipulated by and between Renah F. Camalier and Francis C. Brooke, attorneys for L. P. Steuart & Bro., Inc., Petitioner, and the Honorable Charles Fahy, Solicitor General of the United States, that the following portions shall be omitted from the printed record in the above matter:

1. Exhibit 3 to the complaint, being Ration Order No. 11 of the Office of Price Administration, which exhibit was omitted from the record certified by the Clerk of the United States Court of Appeals for the District of Columbia, and would have been pages 39 to 134, inclusive, of the certified record.

2. All of page 21, after the line beginning with the number "2", and all of pages 22, 23, and 24, to and including the line beginning with the number "187", and insert, in lieu thereof, the following: "Charges 3 to 187, inclusive, are set forth in the same manner as Charges 1 and 2, and relate to purchases from November 4, 1942, to May 28, 1943, both dates inclusive."

[fol. 87] 3. Exhibit 5 to the complaint, being pages 146 to 148, inclusive, of the certified record.

4. Exhibit 6 to the complaint, being pages 149 to 153, inclusive, of the certified record.

Renah F. Camalier, 1366 National Press Building;
Francis C. Brooke, 1366 National Press Building,
Attorneys for L. P. Steuart & Bro., Inc., Charles Fahy, Solicitor General.

[fol. 88] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 3, 1944

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted, and the case is assigned for argument on Monday, May 1st, next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

DATE		PROCEEDINGS	DEPOSITS	FEES	TOTAL
1944		Deposit for costs by— Cumalier	10—	10—	10—
Jan	7	Complaint Exhibits (7) filed			
"	7	Motion for temporary restraining order & P.& A.			
"	7	Motion for preliminary injunction & P&A			
"	7	Temporary Restraining Order issued [illegible]			
"	8	Order [illegible]			
"	13	Entered acknowledgment of service of Motion for Temporary Restraining Order, Ruling Injunction and of Complaint by Lasky filed			
"	14	Joint and several answer of Defts			
"	"	Heard on continuing restraining order (attys in Court) Bailey J			
"	"	Heard motion for preliminary injunction, reported by Bailey J			
"	"	Gertrude Block, (O.P.A.) submitted " "			
"	21	Opinion of the Court by			
"	"	Letter of 1-10-44; letter of 1-14-44; letter of 1-14-44 [illegible]			
"	24	Order granting motion for summ. judg. & dismissing complaint with costs. Bailey J. (attys in Crt)			
	24	Notice of appeal by pltff (copy mailed to Lasky)			
	24	Deposit by Cumalier for clerks costs on appeal	5—	5—	5—
		Order allowing Pltff to make deposit of $100 in lieu of bond on appeal & stay [illegible]			
		Deposit by Cumalier in lieu of bond on appeal (attys in Crt)	100—		
		Stipulation re record & order [illegible] Bailey J	75	75	75
"	26	Order continuing temporary restraining order (attys in Crt)			
"	29	Stipulation by attys of record as to stipulation to record on appeal filed			

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 793

L. P. STEUART & BRO., INC., *Petitioner,*

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

RENAH F. CAMALIER,
FRANCIS C. BROOKE,
National Press Building,
Washington, D. C.
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. .....

L. P. STEUART & BRO., INC., *Petitioner*,

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner L. P. Steuart & Bro., Inc., a corporation (hereinafter sometimes called the plaintiff) respectfully presents this petition for a writ of certiorari to review the final judgment of the United States Court of Appeals for the District of Columbia, rendered February 18, 1944, which affirmed the judgment of the District Court of the United States for the District of Columbia, in favor of respondents (hereinafter sometimes called the defendants) and against petitioner (R. 71).

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

The plaintiff, a retail fuel oil dealer, filed a complaint in the District Court of the United States for the District of Columbia (R. 1) seeking to enjoin the enforcement of a "suspension order" issued by the Office of Price Administration. Appropriate motions were filed for a temporary restraining order and for a preliminary injunction. A temporary restraining order (R. 53) was issued by consent and from time to time has been extended and is now in effect.

The judgment of the District Court (R. 62) dismissed the complaint and the judgment of the Court of Appeals affirmed that of the District Court (R. 71). As recited in the judgment of the District Court, there were no material issues of fact.

The plaintiff for many years has been engaged in the retailing of fuel oil (R. 2). In the course of its fuel oil business, it has invested approximately $750,000.00 in the various facilities necessary to the conduct of such a business. In compliance with recommendations of the Petroleum Administrator for War, it expended $50,000 to increase its storage, unloading and delivery facilities. Due to this fact and to the failure of its competitors so to do, plaintiff is better able to serve the retail purchasing public including the Government than are its competitors (R. 2).

In February of 1943, the Office of Price Administration issued Procedural Regulation 4 (Fed. Reg. 1744). Because of the fact that the provisions of Procedural Regulation 4 will be frequently referred to in this petition and brief, the regulation is set forth at length in the Record at Pages 13-22, inclusive. The Regulation prescribes the procedure to be followed in issuing suspension orders (Section 1300.151, R. 14). A suspension order is defined by Section 1300.180(f) (R. 22) as follows:

> " 'Suspension order' means an order which regulates or prohibits, for a period, the sale, transfer, delivery or other disposition or the acquisition or use of com-

modities or facilities, *and which is issued against a person who has acted in violation of a rationing order or regulation.*" (Italics supplied.)

The Regulation provides for the manner of instituting proceedings, Section 1300.152 (R. 14), a statement of charges and notice of hearing, Section 1300.153 (R. 14), a Hearing Commissioner, Section 1300.154 (R. 14), conduct of hearings, right of respondents to counsel, and rules of evidence, Section 1300.156 (R. 15), subpoenas, Section 1300.157 (R. 15), witnesses, Section 1300.158 (R. 16), contempt, Section 1300.159 (R. 16), briefs, Section 1300.163 (R. 17), orders of Hearing Commissioners, Section 1300.165 (R. 17), appeals to the Hearing Administrator, Section 1300.170—1300.175 (R. 19-20). As above shown by its definition, a suspension order is issued against a person who *has* acted in violation of a ration order or regulation. Section 1300.165 (R. 17) provides for a determination by a Hearing Commissioner that the respondent *has violated* a ration regulation before he issues a suspension order, and provides that he shall make written findings of fact and conclusions of law.

In October 1942, the Office of Price Administration issued Ration Order 11 (7 Fed. Reg. 8480) which deals with the marketing and use of fuel oil.

Pursuant to the provisions of Procedural Regulation 4, suspension order proceedings were instituted against the plaintiff in Augut, 1943, (R. 3). The specification of charges (R. 24) alleges 227 violations of Ration Order No. 11, which were grouped by both the Hearing Commissioner and the Hearing Administrator as follows (R. 32, R. 43):

1. The purchase of fuel oil without transferring rationing evidence.
2. The sale of fuel oil without requiring the delivery of valid ration evidence.
3. The failure to comply with the requirements of the regulation with respect to the keeping of records.

The alleged violations occurred during the period from November 3, 1942, to June 2, 1943. The Hearing Commissioner sustained the charges that the plaintiff had received fuel oil without transferring proper rationing evidence but found the plaintiff not guilty of the other charges (R. 32-39). On appeal, the Hearing Administrator found the plaintiff guilty of all of the charges (R. 41 *et seq.*), and at the conclusion of his opinion entered the following order (R. 50-51):

> "A. From January 15, 1944 to December 31, 1944, both dates inclusive, respondent shall not, directly or indirectly, receive delivery of fuel oil for resale or transfer to any consumer, nor shall respondent transfer fuel oil to any consumer, provided that (1) if respondent on or before January 10, 1944 delivers to the District Enforcement Attorney of the District of Columbia District Office a duly verified list of the names and addresses of all consumers to whom respondent sold and delivered fuel oil from October 21, 1941 through October 21, 1942, and (2) if respondent surrenders to the District of Columbia District Office before January 15, 1944 all void or expired ration evidences (or delivery receipts) then in its possession, then and in that event respondent may from January 15, 1944 to December 31, 1944, both dates inclusive, transfer fuel oil to any consumer to whom it transferred fuel oil between October 21, 1941 through October 21, 1942, both dates inclusive, and may receive deliveries of sufficient quantities of fuel oil for purposes of resale and transfer to such consumers.
>
> "B. Within thirty (30) days after the receipt of a copy of this order, respondent shall render an accounting to the Director of the District of Columbia District Office (1) for all fuel oil transferred or received by the respondent during the period from 12:01 a. m., October 22, 1942, to the date of such accounting, (2) for all coupons, ration evidences (or delivery receipts) received by or surrendered by the respondent during said period, and (3) showing the quantity of fuel oil (by physical inventory), and coupons, ration evidences (or delivery receipts), on hand and on deposit in its ration bank account as of the date of said accounting.

"C. If at any time during the period of this suspension the Petroleum Administrator for War or his duly authorized agent certifies to the Director of the District of Columbia District Office that the fuel oil needs of the District of Columbia or the area served by respondent cannot be met by the supplies and facilities of other suppliers and dealers in this area in addition to those of respondent's as herein restricted, and that it is, therefore, essential to the welfare of the community that the provisions of this order should be modified, and the District Director joins with respondent in a petition requesting such modification, an order of modification may be entered either by the Chief Hearing Commissioner of Region II or the Hearing Commissioner who heard the case below removing the restrictions herein imposed to the extent such action is shown to be necessary to the welfare of the community or the war effort.

"D. Any terms used in this suspension order that are defined in Ration Order No. 11, shall have the meaning therein given to them.

If the suspension order is enforced, the plaintiff will suffer irreparable damage. There is an annual turnover of 15 to 20 percent in the plaintiff's customers, with the result that the enforcing of the order according to its terms will mean that, instead of being able to sell the amount of oil or to the number of customers to whom the plaintiff sold in the year October 21, 1941 to October 21, 1942 (hereinafter sometimes referred to as the pre-rationing year), the plaintiff will be at best able to supply only a part of them (R. 10). A large percentage of the plaintiff's sales have been for cash. During the pre-rationing year no records were required to be kept, or were kept, which would show who these cash-customers were. Consequently, the plaintiff cannot comply literally with the terms of the order, and a large number of persons who were cash customers in a pre-rationing year would be lost to the plaintiff. The expenditure for storage and handling of fuel oil made pursuant to recommendations of the Petroleum Ad-

ministrator for War will be wasted and of no benefit to the War effort if the suspension order is enforced. During the last few days prior to the filing of the complaint, the Government purchased 250,000 gallons of fuel oil from the plaintiff. By reason of the fact that the Government was not a customer of the plaintiff in the pre-rationing year, plaintiff will not be able to supply the Government if the order is enforced.

Paragraph 7 of the Complaint (R. 6-8) sets forth the plaintiff's charge of the invalidity of the suspension order proceedings and of the suspension order itself. The claim is there made that the suspension order hearings and the suspension order are not authorized by any statute or valid executive order, proclamation or regulation. The claim is also made that Title III of the Second War Powers Act, Act of March 27, 1942 c 199, Title III (56 Stat. 177) U.S.C.A., Title 50, App. 633[1] provides the exclusive remedies for the

[1] Title III of the Second War Powers Act amended Subsection (a) of Section 2 of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236). The concluding sentence of Section 2 (a) (2) as finally amended by Title III of the Second War Powers Act, reads as follows:

> "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

Section 2(a)(5) provides as follows:

> "Any person who willfully performs any act prohibited, or willfully fails to perform any act required by any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both."

Section 2(a)(6) reads in part as follows:

> "The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdic-

enforcement of the plaintiff's duties created by the said statute or by any rule, regulation or order therein; and that if the suspension order is enforced, the plaintiff will have been penalized for alleged violations of regulations of the Office of Price Administration issued pursuant to the Second War Powers Act, without proceedings having been brought in the District Court of the United States and without the plaintiff's having been found guilty by any such court.

The answer of the defendants denied the averments of Paragraph 7 of the complaint and claimed that the suspension order was a valid exercise of the allocation power granted to the President of the United States by Title III of the Second War Powers Act of 1942 (56 Stat. 176) 50 U. S. C. App. section 633),[1] and delegated to the Office of Price Administration. (R. 57).

The complaint averred, and the points were pressed in the courts below, that the suspension order was invalid because it exceeded the authority of the Office of Price Administration under War Production Board Directive No. 1 (7 Fed. Reg. 2719, 2720), and that the suspension order was void because it forced a discrimination between the plaintiff's old customers and others in violation of Ration Order 11. However, the question on which certiorari is requested is whether or not the Office of Price Administration has any statutory authority to issue suspension orders of the type here in question.

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tion of the United States and the courts of the Philippine Islands shall have jurisdiction of violations of this subsection (a) or any rule, regulation, or order or subpoena thereunder, whether heretofore or hereafter issued, and of all civil actions under this subsection (a) to enforce any liability or duty created by, or to enjoin any violation of, this subsection (a) or any rule, regulation, order, or subpoena thereunder whether heretofore or hereafter issued. * * *"

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C. 347(a). The judgment of the United States Court of Appeals of the District of Columbia on which review is sought, was entered on February 18, 1944.

QUESTION PRESENTED.

Does the Office of Price Administration have statutory authority under Title III of the Second War Powers Act to entertain suspension order proceedings prescribed by Procedural Regulation 4 and followed in the instant case and to issue suspension orders?[2]

It is to be noted that the petitioner does not contend and has never contended in this case that Congress was without constitutional power to grant the President authority to do the acts sought to be enjoined in this action. Although this contention has been made in similar cases, it is not made here. The petitioner concedes that Congress could have granted such authority and the sole question relates to the intent of Congress, not its power.

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[2] *Brown* v. *Wilemon* (C. C. A. 5th) 139 F. 2d 730, reversing *Wilemon* v. *Brown* (Texas) 51 F. Supp. 978; *Perkins* v. *Brown* (Georgia) 53 F. Supp. 176; *Joliet Oil Corporation* v. *Brown* (Illinois), —— F. Supp. ——, unreported; *Panteleo* v. *Brown* (New York) —— F. Supp. ——, unreported; *Kotsos* v. *Ivins* (Utah) —— F. Supp. ——, unreported, support the theory that Title III of the Second War Powers Act authorizes the issuing of suspension orders.

Sims v. *Talbert* (South Carolina), 52 F. Supp. 688, and *Wilemon* v. *Brown, supra*, reversed by *Brown* v. *Wilemon, supra*, hold that suspension orders are void and are not authorized by the statute. *B. Simon Hardware Co.* v. *Nelson* (District of Columbia) 52 F. Supp. 474, holds that a suspension order is not authorized when used as a penalty. The District Court in the present case seeks to distinguish the present case from *B. Simon Hardware Co.* v. *Nelson* (R. 61).

In *Gallagher's Steak House, Inc.* v. *Bowles* the United States District Court for the Southern District of New York sustained the validity of the suspension order, but that case is now being considered by the Circuit Court of Appeals of the Second Circuit.

REASONS FOR ALLOWANCE OF WRIT.

Petitioner submits the following reasons for the allowance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia:

1. The United States Court of Appeals for the District of Columbia has decided a question of substance relating to the construction and application of a statute of the United States, which has not been, but should be, settled by this Court.[2]

2. The United States Court of Appeals for the District of Columbia has decided a federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE, your petitioner respectfully prays that writ of certiorari issue to the United States Court of Appeals for the District of Columbia, and submits herewith its brief in support of this petition.

Respectfully submitted,

RENAH F. CAMALIER,
FRANCIS C. BROOKE,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. ———.

L. P. STEUART & BRO., INC., *Petitioner*,

v.

CHESTER BOWLES, Administrator, Office of Price Administration, et al.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

A.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States Court of Appeals is not yet reported but is set forth on Pages 66-71, inclusive, of the Record. The opinion of the District Court is not reported but appears on Pages 59-62 of the Record.

B.

JURISDICTION.

I.

The jurisdiction of this Court is sustained by Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, U. S. C. A. Title 28, Section 347 (a).

II.

The date of the judgment to be reviewed is February 18, 1944 (R. 71).

III.

The grounds on which jurisdiction of this Court is invoked are set forth in the reasons for the allowance of writ in the petition.

IV.

STATEMENT OF THE CASE.

The case has been stated under heading "Summary and Short Statement of Matter Involved" in the petition.

SUMMARY OF ARGUMENT.

It must be conceded that Title III of the Second War Powers Act does not expressly give to the President the power to issue suspension orders based upon past violations of ration orders or regulations. The opinions of the Courts below, and those decisions of other Courts sustaining the validity of suspension orders, are based on the view that the power to "allocate" scare materials includes the power to issue suspension orders predicated solely upon past violations of offenders against ration regulations. They urge that a dealer is an "agent" or "licensee" whose agency or license may be revoked for violation.[1] They base their construction in part upon the theory of substantial reenactment by Congress after an administrative interpretation.[2]

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[1] "Though no license was issued, such was the effect of the arrangement; and by acceptance of it the filling station operators impliedly agreed to abide by the regulations. They became in effect the appointees of the Government to assist in the administration of the rationing. If any of them should prove untrustworthy or noncooperative, we think it a fair exercise of administrative power to withdraw from such, temporarily or permanently, the privilege of distributing the allocated and rationed material." *Brown* v. *Wilemon*, 139 F. 2d 730, 731-32. See opinion of Bailey, J. (R. 59, 61.)

[2] *Perkins* v. *Brown*, 53 F. Supp. 176, 180-81. See opinion of United States Court of Appeals for the District of Columbia (R. 67, 68-69).

Those decisions which deny that the Executive has the authority under the statute in question characterize them as penalties inflicted in quasi-judicial proceedings, and adhere to the view that neither the proceedings nor the penalty are authorized.[3] They reject the theory that suspension orders have been sanctioned by a reenactment of the statute after an administrative interpretation.[4]

The Petitioner urges that the decisions upholding suspension orders are fallacious because:

(1) Dealers are not licensees or agents of the Government, and even if they were, the right in the Executive to suspend or reject the agency or license is not to be implied;

(2) Even if there were a right to revoke an agency or license, there is no implied right to penalize or punish under the guise of the exercise of a licensing power.

The Petitioner also urges that both the legislative history and language of Title III of the Second War Powers Act destroy any theory that Congress ratified an administrative interpretation.

ARGUMENT.

I.

Dealers Are Not Licensees or Agents of the Government.

Section 2 (a) (6) of Title III of the Second War Powers Act[5] gives to the District Courts of the United States jurisdiction

> "of all civil actions under this subsection (a) to enforce any liability or duty created by, or to enjoin any violation of, this subsection (a) or any rule, regulation, order, or subpoena thereunder . . ."

[3] *Sims* v. *Talbert*, 52 F. Supp. 688, 693. "It is pure fiction to say that the suspension order is not punitive as to Sims."

[4] *B. Simon Hardware Co.* v. *Nelson*, 52 F. Supp. 474.

[5] Act March 27, 1942, c. 199 (56 Stat. 176) U. S. C. A. Title 50 App. Sec. 633.

In view of the fact that the Act provides for both civil and criminal enforcement through the Courts, it would appear under the usual rules of statutory construction that those means were exclusive, especially since the phrase "all civil actions" was employed.

It is notable that none of the decisions characterizing a dealer as an agent or licensee cite authority for their designation. The Act itself makes no mention of the licensing power. Neither does it refer to any agency. These decisions generally cite two reasons for their conclusions. The first is that the legislation was enacted during wartime and must be broadly construed. See *Perkins* v. *Brown*, 53 F. Supp., 176, 179. The other reason is an allegation that the Government has the power to buy and sell and that if, instead of so doing or setting up its own buying and selling agencies, it chose to allow dealers to remain in business, the dealers' activities became a privilege which could be withdrawn as to any one dealer when the Executive was satisfied that that dealer was an offender.

The proposition that the Act can be loosely construed is denied by its history. The act of June 28, 1940 (54 Stat. 676) had been administered for ten months before the Priorities and Allocations Act of 1941 (55 Stat. 236) was introduced. The language of the Priorities and Allocations Act was suggested by the Office of Production Management which had been administering the prior act. See Hearings, House Committee on Naval Affairs, April 28, 1941, on H. R. 4534, Pages 990 *et seq.* The language suggested was practically identical with that of the Priorities and Allocations Act as it passed Congress. In none of the hearings and reports is there any mention of a licensing power or agency.[6]

[6] Hearing on H. R. 4534 before House Committee on Naval Affairs, April 28, 1941; House Report No. 460, 77th Cong., 1st Sess.; Hearings, Senate Committee on Military Affairs on H. R. 4534, May 14, 1941; Senate Report No. 309, 77th Cong., 1st Sess.

The Priorities and Allocations Act of 1941 had in turn been administered for more than six months before the Second War Powers Act was introduced. The language of the allocation sentence was practically unchanged; but criminal and civil proceedings were requested by the Attorney General and provided in the Act. Title III of the Second War Powers Act cannot, therefore, be characterized as hasty wartime legislation. It must be concluded that the licensing power was neither requested nor given.

The proposition that the Act cannot be loosely construed to give a licensing power and that the licensing power was not given is fortified when it is remembered that even in emergencies Congress has been aware of the utility of this power. In Section 5 of the Lever Act, Act of August 10, 1917, c. 53 (40 Stat. 276), Congress expressly gave the President the power to license the dealing in necessaries. Further, in the Emergency Price Control Act of 1942 which was before Congress at the same period of the present emergency as was the Second War Powers Act, Congress gave the licensing power to the Office of Price Administration. The history of the Emergency Price Control Act shows that the then Administrator and the then General Counsel of the Office of Price Administration recognized not only the utility of the licensing power but the necessity of express provision for it in the statute. They recommended a licensing power before the House Committee on Banking and Currency. When the bill as it passed the House was silent as to licensing, they appeared before the Senate Committee on Banking and Currency and urged that the licensing power be included. The Act, as passed, does include the licensing power; but the revocation of license is surrounded by safeguards, and is reserved to the courts.

Neither can a licensing power be based on an implied power in the Executive to buy and sell scarce commodities. This was recognized by the General Counsel of the Office of Price Administration at the time the Emergency Price Control Act was before Congress. He devoted several pages

of his brief filed with the Senate Committee on Banking and Currency to the proposition that the power to buy and sell must be expressly given, and demonstrated that previous legislation failed to give that power. See Hearings, Senate Committee on Banking and Currency, 77th Cong., 1st Session, on H. R. 5990, 239, 232 et seq. It is further to be noted that the Emergency Price Control Act did give the Office of Price Administration power to buy and sell upon certain contingencies and subject to certain conditions.

The importance of the fact that Congress provided for licenses and revocations in the Emergency Price Control Act, but did not do so in the Second War Powers Act, cannot be too strongly stressed. To hold that the power to license and revoke licenses is vested in the Executive under Title III of the Second War Powers Act, not only can, but has, resulted in a perversion of the congressional intent which has already been noticed by Congress. On November 15, 1943, the House of Representatives Select Committee to Investigate Executive Agencies issued a report,[7] which disclosed that instead of bringing revocation proceedings in the courts for price violations, the Office of Price Administration adopted the device of inserting in their ration rules and regulations provisions prohibiting the dealers in rationed commodities from selling above the ceiling price. When such a dealer violated the ceiling price, no court proceedings were instituted against him to revoke his license under the Emergency Price Control Act, but the Office of Price Administration would issue a suspension order under Procedural Regulation 4 on the ground that the violation of a ceiling price was *ipso facto* a violation of the ration rules and regulations. As disclosed by the report, during a five-month period, 392 suspension orders were issued based solely on price violations, while during that same period, and one month beyond, only ten license suspension proceedings had been instituted in the courts.

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[7] Second Intermediate Report of the Select Committee to Investigate Executive Agencies, House Report No. 862, 78th Cong., 1st Sess.. Pages 18-19.

II.

Even if Dealers Were Licensees, There is no Power Given by the Act to Revoke Their Licenses.

Statutes giving the right to suspend the doing of business are to be strictly construed. *Wallace* v. *Cutten*, 298 U. S. 229. *United States ex rel Daly* v. *Macfarland*, 28 App. D. C. 552. The decisions cited by the Court of Appeals in support of its conclusions are those where the right to suspend was expressly given.[8] Where Congress in companion legislation, namely, the Emergency Price Control Act of 1942, has set forth in detail the manner of revocation of a license, it would strain construction to hold that the right in the Executive to revoke would be implied. See *United States ex rel Daly* v. *Macfarland, supra.*

III.

Even if There Were a Right to Revoke an Agency or License, There is no Implied Right to Penalize Under the Guise of the Exercise of a Licensing Power.

Mr. Justice Bailey, who decided the instant case in the District Court, held in *B. Simon Hardware Co.* v. *Nelson*, 52 F. Supp. 474, that Title III of the Second War Powers Act does not give to the Executive the power to use a suspension order as a penalty. He distinguishes that case from this by saying that in the one the suspension order was penal and in the other remedial. The only difference between the cases apparent in the opinions is that in the *Simon Hardware* case the word "penalty" was used in the caption of the regulation and the notice of the proceedings. This would seem to place too much significance on the use of a word. No mere exercise of the art of lexicography can

[8] *Wright* v. *Securities & Exchange Commission*, 112 F. 2d 89 (C. C. A. 2d); *Nichols & Co.* v. *Secretary of Agriculture*, 131 F. 2d 651 (C. C. A. 1st); *Nelson* v. *Secretary of Agriculture*, 133 F. 2d 543 (C. C. A. 7th).

alter the essential nature of an act or thing, and if a suspension order is a penalty, failure to call it such does not change its nature. Compare *United States* v. *La Franca*, 282 U. S. 568, 572.

Conceding for the sake of argument the power to license, the inquiry as to whether a revocation of the right to do business is a penalty depends, as was said in *Ex Parte Garland*, 4 Wall. 333, 380, on whether the power to prescribe qualification "has been exercised as a means for the infliction of punishment."

The reasoning adopted in *Brown* v. *Wilemon*, 139 F. 2d, is strikingly similar to that of the Attorney General for Missouri in *Cummings* v. *Missouri*, 4 Wall. 277, 320. There the Court, after demonstrating that the right to pursue a trade is a business right, held that a deprivation or suspension of that right *for past conduct* is a punishment. An analysis of Procedural Regulation 4 and of the proceedings in the instant case shows that they were quasi-judicial in character and were employed for the imposition of a penalty. Procedural Regulation 4 defines a suspension order as one issued against a person "who has acted in violation of a rationing order or regulation." The Hearing Commissioner must find a violation before he can issue a suspension order. A dealer can threaten to violate without being reached by the prescribed proceedings. He may have violated the orders of the Petroleum Administrator for War, the Office of Defense Transportation, and the War Production Board but, under its own regulations, the Office of Price Administration neither attempts to prevent his going into business nor to put an end to his business. He may be convicted of the worst felony with no ill results so far as becoming or remaining a dealer is concerned.

Brown v. *Wilemon*, *supra*, characterizes the tribunals set up by Procedural Regulation 4 as "an elaborate system of quasi-courts." The brief of the Office of Price Administration filed with the House Committee on Banking and Currency recognized the quasi-judicial character of proceed-

ings for the suspension or revocation of a license. In the summary of its brief there appears the following language:

> "However, because it is recognized that the suspension or revocation of a license may involve the exercise of quasi-judicial powers, the proposed statute provides for quasi-judicial hearings in connection with such suspension or revocation. It also provides for review in the emergency court of orders of suspension or revocation, * * *."

See Hearings Before Committee on Banking and Currency, House of Representatives, 77th Cong., 1st Session, on H. R. 5479, superseded by H. R. 5990, Page 340. The report of the Select Committee to Investigate Executive Agencies, at Page 14, characterizes the procedure of the Office of Price Administration as the establishing by the Office of Price Administration of its own judiciary along with prosecuting attorneys and a constabulary.

Congress treats the withdrawal of a priority or allotment as a penalty in the Federal Reports Act of 1942, Act of December 24, 1942, c. 811 (56 Stat. 1078), U. S. C. A. Title 5, Section 139 (f).

The Government, in *Hamner* v. *United States* (C. C. A. 5th), 134 F. 2d 592, 594, argued "that the rationing regulations *create an offense* by imposing as a *penalty* on violators an inability to get more tires."

The Office of Price Administration, instead of seeking an injunction in the courts when the alleged violation were occurring, waited until after the close of the ration year ending June 30, 1943, and then brought its proceedings. Although the present heating season is drawing to a close, there is no intimation at any point in this case that the Petitioner is violating, or during the present heating season has violated, a ration order or regulation.

The Court below cites *Hawker* v. *New York*, 170 U. S. 189; *Wright* v. *Securities and Exchange Commission*, 112 F. 2d 89; *Nichols and Co.* v. *Secretary of Agriculture*, 134 F. 2d 651; and *Nelson* v. *Secretary of Agriculture*, 133 F. 2d

543, in support of its proposition that the suspension order is remedial. In each of those cases, there was a statute expressly giving the right to suspend the doing of business for past misconduct. Legislation may be remedial and yet authorize penal or punitive action, but the authorization must be expressly given. The opinion of Mr. Justice Brandeis in *Wallace* v. *Cutten*, 298 U. S. 229, clearly demonstrates that in a remedial statute the power to suspend or revoke the right to do business *for past misconduct* is not to be implied.

IV.

Congress Did Not Ratify a Practice of Issuing Suspension Orders.

The theory of congressional ratification of an administrative interpretation was rejected in *B. Simon Hardware Co.* v. *Nelson*, 52 F. Supp. 474. The Court of Appeals in the instant case states that the practice of issuing such orders was brought to the attention of Congress when the Second War Powers Act was under consideration. Even the Respondents did not make so strong a statement in their brief in the Court of Appeals. It is true that the Attorney General and the General Counsel for the Office of Price Administration both said that the penalty of withdrawing priorities *could* be invoked, but neither of them said that such a penalty *had* been invoked.[9] The Attorney General

[9] The Attorney General filed a statement with both the Senate and House Judiciary Committees setting forth the purpose and necessity of the Second War Powers Act. The pertinent portion of his statement with respect to Title III reads:

> "Investigations conducted by the Priorities Division of the Office of Production Management indicate violations of priorities and allocations orders are widespread and serious. It is true that there are various administrative sanctions available to the Office of Production Management. Fuel and power might be cut off to a factory violating the priorities order as was done during the World War on several occasions. But administrative sanctions, although highly important, do not provide an adequate remedy in all cases. For example at a time when airplane production is vitally needed, it would not

did infer that administrative penalties were invoked in the last war, but as above shown, *supra*, p. 15, the Lever Act contained the licensing power and gave to the Government the right to buy and sell fuel. It is to be noted that the Attorney General did not refer to suspension orders; and most certainly he did not refer to suspension orders based on past conduct alone. However, even by giving to the remarks of the Attorney General the broadest implications, a ratification cannot be spelled out. There is no showing of ambiguity in the statute itself. The interpretation was not of long standing. See *Iselin* v. *United States*, 270 U. S. 245, 251. Neither can an interpretation supply omissions in the statute. *Wallace* v. *Cutten*, 298 U. S. 229, 237. See *United States* v. *Weitzel*, 246 U. S. 533, 542-543.

CONCLUSION.

A perusal of the complaint (R. 1-13) shows that the theory of the Petitioner's case was a lack of authority on the part of the Office of Price Administration to issue suspension orders predicated upon alleged past violations. The complaint did not seek a judicial review of the actions of the Office of Price Administration, because to have done so would have admitted the validity of suspension order proceedings prescribed by Procedural Regulation 4. Therefore, Petitioner could not, with propriety, raise the issue as to whether the findings of the Hearing Administrator were true or not. The burden of its complaint was that if the suspension order were enforced it would be penalized and punished for alleged violations without having been found guilty by any court. See Paragraph 7 of the complaint

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facilitate war production to curtail the supply of aluminum to an airplane company and thus close the plant.

"The civil and criminal remedies provided are intended to supply the means whereby priorities orders and allocations can be enforced when administrative sanction are not appropriate."

See Hearings before the Committee on the Judiciary, House of Representatives, 77th Cong., 2d Sess., on S. 2208, January 30 and February 2, 1942.

(R. 6-7). The answer of the Respondents (R. 56-58) recognized this as the only issue, and did not allege that the findings of the Hearing Administrator were true or even that they were based upon substantial evidence. The Court of Appeals, during the oral argument, admonished counsel for Petitioner to refrain from going into the issue of the truth or correctness of the findings of the Hearing Administrator. Despite this fact, the opinion pyramids inference upon inference in arriving at its conclusion. It found violations (R. 69). It found that the Petitioner had informed the Hearing Administrator that it "considered its first duty to be the supplying of its customers with oil and that the conformity of the requirements of the rationing system was subordinate thereto" (R. 69). It justifies this finding by the statement, "The language is the Hearing Administrator's. Appellant has not denied its accuracy." The opinion proceeds to interpret the statement as having a more horrendous meaning by saying that it amounted to the Petitioner's deliberate determining, as a matter of general policy, to meet what it considered the needs of its customers whether or not they had rationing evidence. No such inference is justified by the pleadings. Entirely aside from the fact that the issue before the Court precluded the affirmation or denial of every statement made by the Hearing Administrator in his opinion, the reasoning of the Court is fallacious, because it begs the question. The issue was whether the Office of Price Administration had the power to try and punish an alleged offender. The statement that the offenses were heinous does not prove authority. Lynchings are justified on such reasoning.

The bases upon which the decisions upholding suspension orders are predicated, do not exist. It is respectfully submitted that this Court should issue its writ of certiorari and reverse the decision of the lower Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 793.

L. P. STEUART & BRO., INC., *Petitioner,*

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the United States Court of Appeals is not yet reported but is set forth on Pages 66-71 of the record. The opinion of the District Court is not reported, but appears on Pages 59-62 of the record.

JURISDICTION.

The judgment of the United States Court of Appeals was entered on February 18, 1944 (R. 71). The petition for a writ of certiorari was granted on April 3, 1944. The jurisdiction of this Court rests on Section 240 of the Judicial Code, as amended by Act of February 13, 1925; U. S. C. A. Title 28, Section 347 (a).

QUESTION PRESENTED.

Does the Office of Price Administration have statutory authority under Title III of the Second War Powers Act to entertain suspension order proceedings prescribed by Procedural Regulation 4 of that office, and to issue suspension orders prescribed by that Regulation, that is to say orders which regulate or prohibit, for a period, the sale, transfer, delivery or other disposition or the acquisition or use of commodities or facilities, and which are issued against a person who has acted in violation of a rationing order or regulation?

STATUTE INVOLVED.

Title III of the Second War Powers Act is set forth at length in the Appendix, *infra*, Page 40.

The provisions primarily involved are:

> "(2) • • • Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."
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> • • • • • • • • • •
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> "(5) Any person who willfully performs any act prohibited or willfully fails to perform any act required by, any provision of this subsection (a) or any

rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

"(6) The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States and the courts of the Philippine Islands shall have jurisdiction of violations of this subsection (a) or any rule, regulation, or order or subpena thereunder, whether heretofore or hereafter issued, and of all civil actions under this subsection (a) to enforce any liability or duty created by, or to enjoin any violation of, this subsection (a) or any rule, regulation, order, or subpena thereunder whether heretofore or hereafter issued. Any criminal proceeding on account of any such violation may be brought in any district in which any act, failure to act, or transaction constituting the violation occurred. Any such civil action may be brought in any such district or in the district in which the defendant resides or transacts business. Process in such cases, criminal or civil, may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found; and subpena for witnesses who are required to attend a court in any district in any such case may run into any other district. No costs shall be assessed against the United States in any proceeding under this subsection (a).

* * * * * * * * *

"(8) The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe."

STATEMENT.

Petitioner, a retail fuel oil dealer, filed a complaint in the District Court of the United States for the District of Columbia (R. 1) seeking to enjoin the enforcement of a "suspension order" issued by the Office of Price Administration. Appropriate motions were filed for a temporary re-

straining order and for a preliminary injunction. A temporary restraining order (R. 53) was issued by consent and from time to time has been extended; and is now in effect.

The judgment of the District Court (R. 62) dismissed the complaint and the judgment of the Court of Appeals affirmed that of the District Court (R. 71). As recited in the judgment of the District Court, there were no material issues of fact.

Petitioner for many years has been engaged in the retailing of fuel oil (R. 2). In the course of its fuel oil business, it has invested approximately $750,000.00 in the various facilities necessary to the conduct of such a business. In compliance with recommendations of the Petroleum Administrator for War, it expended $50,000 to increase its storage, unloading and delivery facilities. Due to this fact and to the failure of its competitors so to do, Petitioner is better able to serve the retail purchasing public including the Government than are its competitors (R. 2).

By Executive Order 9125 (7 Fed. Reg. 2719-2720), the President conferred his power under Section 2 (a) (2) of Title III of the Second War Powers Act on the War Production Board and confirmed War Production Board Directive No. 1 (7 Fed. Reg. 562) which lodged in the Office of Price Administration certain of the Board's allocation power under the earlier acts. By Supplementary Directive 1-0, the War Production Board delegated to the Office of Price Administration specific authority over the rationing of fuel oil (7 Fed. Reg. 9418). Although the point was made and stressed below that the suspension order here in question was invalid because it exceeded the authority of the Office of Price Administration under War Production Board Directive 1 and 1-0, certiorari was not requested on that question. At this stage of the case, it is assumed that the President has delegated to the Office of Price Administration whatever authority he has under Title III of the Second War Powers Act.

In February of 1943, the Office of Price Administration issued Procedural Regulation 4 (8 Fed. Reg. 1744). This Regulation is set forth at length in Pages 18-22, inclusive, of the Record. The Regulation prescribes the procedure to be followed in issuing suspension orders (Section 1300.151, R. 14). A suspension order is defined by Section 1300.180(f) (R. 22) as follows:

> "'Suspenion order' means an order which regulates or prohibits, for a period, the sale, transfer, delivery or other disposition or the acquisition or use of commodities or facilities, *and which is issued against a person who has acted in violation of a rationing order or regulation.*" (Italics supplied.)

The Regulation provides for the manner of instituting proceedings, Section 1300.152 (R. 14), a statement of charges and notice of hearing, Section 1300.153 (R. 14), a Hearing Commissioner, Section 1300.154 (R. 14), conduct of hearings, right of respondents to counsel, and rules of evidence, Section 1300.156 (R. 15), subpoenas, Section 1300.157 (R. 15), witnesses, Section 1300.158 (R. 16), contempt, Section 1300.159 (R. 16), briefs, Section 1300.163 (R. 17), orders of Hearing Commissioners, Section 1300.165 (R. 17), and appeals to the Hearing Administrator, Section 1300.170-1300.175 (R. 19-20). Section 1300.165 (R. 17) provides for a determination by a Hearing Commissioner that the respondent *has violated* a ration regulation before he issues a suspension order, and provides that he shall make written findings of fact and conclusions of law.

In October, 1942, the Office of Price Administration issued Ration Order 11 (7 Fed. Reg. 8480) which deals with the marketing and use of fuel oil.

Pursuant to the provisions of Procedural Regulation 4, suspension order proceedings were instituted against Petitioner in August, 1943, (R. 3). The specification of charges (R. 24) alleges 227 violations of Ration Order No. 11, which were grouped by both the Hearing Commissioner and the Hearing Administrator as follows (R. 32, R. 43):

1. The purchase of fuel oil without transferring rationing evidence. (187 of the alleged violations related to daily purchases falling in this group. R. 25)

2. The sale of fuel oil without requiring the delivery of valid ration evidence.

3. The failure to comply with the requirements of the regulation with respect to the keeping of records.

The alleged violations occurred during the period from November 3, 1942, to June 2, 1943. The Hearing Commissioner sustained some of the charges and found Petitioner was not guilty as to others (R. 32-39). On appeal, the Hearing Administrator found Petitioner guilty of all of the charges (R. 41 *et seq.*), and at the conclusion of his opinion entered the following order (R. 50-51) (Petitioner was referred to as "Respondent" in the order):

> "A. From January 15, 1944 to December 31, 1944, both dates inclusive, respondent shall not, directly or indirectly, receive delivery of fuel oil for resale or transfer to any consumer, nor shall respondent transfer fuel oil to any consumer, provided that (1) if respondent on or before January 10, 1944 delivers to the District Enforcement Attorney of the District of Columbia District Office a duly verified list of the names and addresses of all consumers to whom respondent sold and delivered fuel oil from October 21, 1941 through October 21, 1942, and (2) if respondent surrenders to the District of Columbia District Office before January 15, 1944 all void or expired ration evidences (or delivery receipts) then in its possession, then and in that event respondent may from January 15, 1944 to December 31, 1944, both dates inclusive, transfer fuel oil to any consumer to whom it transferred fuel oil between October 21, 1941 through October 21, 1942, both dates inclusive, and may receive deliveries of sufficient quantities of fuel oil for purposes of resale and transfer to such consumers.

"B. Within thirty (30) days after the receipt of a copy of this order, respondent shall render an accounting to the Director of the District of Columbia District Office (1) for all fuel oil transferred or received by the respondent during the period from 12:01 a. m., October 22, 1942, to the date of such accounting, (2) for all coupons, ration evidences (or delivery receipts) received by or surrendered by the respondent during said period, and (3) showing the quantity of fuel oil (by physical inventory), and coupons, ration evidences (or delivery receipts), on hand and on deposit in its ration bank account as of the date of said accounting.

"C. If at any time during the period of this suspension the Petroleum Administrator for War or his duly authorized agent certifies to the Director of the District of Columbia District Office that the fuel oil needs of the District of Columbia or the area served by respondent cannot be met by the supplies and facilities of other suppliers and dealers in this area in addition to those of respondent's as herein restricted, and that it is, therefore, essential to the welfare of the community that the provisions of this order should be modified, and the District Director joins with respondent in a petition requesting such modification, an order of modification may be entered either by the Chief Hearing Commissioner of Region II or the Hearing Commissioner who heard the case below removing the restrictions herein imposed to the extent such action is shown to be necessary to the welfare of the community or the war effort.

"D. Any terms used in this suspension order that are defined in Ration Order No. 11, shall have the meaning therein given to them."

If the suspension order is enforced, Petitioner will suffer irreparable damage. There is an annual turnover of fifteen to twenty per cent in its customers (R. 10). Petitioner therefore will not be able to sell the amount of oil to the number of customers to whom it sold in the year October 21, 1941-October 21, 1942 (hereinafter sometimes referred to as the "prerationing year"), but will be able to supply

only a part of them (R. 10). A large percentage of Petitioner's sales has been for cash. During the pre-rationing year no records were kept, or required to be kept, which would show who these cash customers were. Consequently, Petitioner does not know who all of its customers in the pre-ration year were, and a large number of persons who were such customers at that time will be lost. The expenditure for storage and handling of fuel oil made pursuant to the recommendations of the Petroleum Administrator for War will be wasted and of no benefit to the War effort if the suspension order is enforced. During the last few days prior to the filing of the complaint, the Government purchased 250,000 gallons of fuel oil from the plaintiff. By reason of the fact that the Government was not a customer of Petitioner in the pre-rationing year, Petitioner will not be able to supply the Government if the order is enforced.

Paragraph 7 of the Complaint (R. 6-8) sets forth Petitioner's charge of the invalidity of the suspension order proceedings and of the suspension order itself. The claim is there made that the suspension order hearings and the suspension order are not authorized by any statute or valid executive order, proclamation or regulation. The claim is also made that Title III of the Second War Powers Act provides the exclusive remedies for the enforcement of Petitioner's duties created by the said statute or by any rule, regulation or order therein; and that if the suspension order is enforced, Petitioner will have been penalized for alleged violations of regulations of the Office of Price Administration issued pursuant to the Second War Powers Act, without proceedings having been brought in the District Court of the United States and without Petitioner's having been found guilty by any such court.

The answer of the Respondents claimed that the suspension order was a valid exercise of the allocation power granted to the President of the United States by Title III of the Second War Powers Act of 1942 (56 Stat. 176) 50 U.S.C. App. Sec. 633, and delegated to the Office of Price Administration. (R. 57).

SPECIFICATION OF ERROR.

The United States Court of Appeals for the District of Columbia erred in holding that the Office of Price Administration has authority under Title III of the Second War Powers Act to entertain suspension order proceedings prescribed by Procedural Regulation 4 of that office and to issue suspension orders prescribed by that regulation, that is, orders which regulate or prohibit the sale, transfer, delivery, or other disposition, or the acquisition or use of commodities or facilities, and which are issued against a person who has acted in violation of a rationing order or regulation.

SUMMARY OF ARGUMENT.

The statute in question contains no express authority to withhold rationed commodities from a person merely because that person has violated a regulation. The statute provides for methods of enforcement, and its silence as to other methods indicates that no other methods were authorized.

The suspension orders prescribed by Procedural Regulation 4 are penal in character. Therefore, statutory authority for their issuance cannot be left to implication, but must be clearly expressed.

The penal characteristics of the suspension orders, and the consequences of these characteristics, are not avoided by terming dealers in rationed commodities "agents," "licensees," or "quasi-licensees." They are in fact neither agents nor licensees nor quasi-licensees. Even if they are, authority is not given to terminate their rights by way of punishment for past misdeeds.

The omission in the statute of authority to issue suspension orders has not been supplied by notice or ratification of administrative interpretations.

ARGUMENT.

I.

The Statute Contains No Express Authority to Withhold Rationed Commodities for Previous Violations, But Does Provide Other Remedies and Means of Enforcement.

Section 2(a)(5) of the Act, provides that for wilful violations of the Act itself or regulations thereunder the violator shall be guilty of a misdemeanor and be fined not more than $10,000 or imprisoned for not more than a year. Section 2(a)(6), gives the District Courts jurisdiction of violations of the subsection or of any rule thereunder and of *all* civil actions to enforce any liability or duty or to enjoin any violation of the Act or any regulation thereunder. Section (2)(a)(6) likewise gives the District Courts power to enjoin violations.

It is realized that the rule that provision for certain means of enforcement and omission of others implies that the omission of the other means of enforcement was deliberate is only a rule of construction, and is not conclusive. However, the fact that Section 2(a)(6) gives the District Courts jurisdiction of "*all* civil actions" to enforce both the statute and the regulations cannot be ignored.

Further, the fact that Congress has fixed a limit on the extent of criminal punishment cannot be disregarded when it is realized that under Procedural Regulation 4, suspension orders which may be much more drastic in effect are provided for, *infra*, 18-19. Again, the Courts are given power to enjoin violations of regulations. Congress presumably intended, however, that this power should not be unlimited but should be subject to the well-known rules of equity concerning the issuance of an injunction. Compare *Hecht Company* v. *Bowles*, ... U. S. ...., unreported. As noted, *infra*, 18-19, Procedural Regulation 4 requires no finding by a Hearing Commissioner as to whether a violation is apt to be repeated or whether future violations are

threatened. Moreover, Congress thought it necessary in this Act expressly to give to the Courts authority merely to enjoin future violations. This Court is asked by the Respondents here to hold that the power to end altogether an offender's business or trading may be implied.

Aside from the suspension orders now being issued under the purported authority of the Act by the Office of Price Administration, the War Production Board, and the Office of Defense Transportation, no instances can be found of suspension orders of the type here in question, issued by administrative officers, where statutory authority therefor does not clearly appear. Where administrative penalties or "suspension orders" have been authorized, Congress has uniformly provided in detail the grounds upon which they should issue, the limits of the suspension order, and the extent of judicial review. No such provisions are found here. When Congress has limited the criminal penalty for a violation of the statute or regulations thereunder to $10,000 or one year in jail, can it be said that it authorized by implication an economic death sentence? Had the authority to issue suspension orders for past violations been requested, Congress would have granted such authority, if at all, only upon surrounding the granted power with limitations and safeguards.

The Respondents cite as authority to issue suspension orders the provision of Section 2(a)(2) of the Act, which provides that the President may "allocate" materials. We have, therefore, one of those problems in the reading of the statute wherein meaning is sought to be derived not from specific language but out of the innuendos of a portion of it. "At best, this is a subtle business, calling for great wariness, lest what professes to be mere rendering becomes creation, and attempted interpretation of legislation becomes legislation itself." Compare *Palmer* v. *Massachusetts*, 308 U. S. 79, 83.

II.

The Suspension Order Prescribed by Procedural Regulation 4 and Issued in This Case was Penal in Nature, and the Power to Issue It is Therefore Not to be Implied.

Purpose of Inquiry and Meaning to be Ascribed to the Term "Penalty" for the Purpose of this Case.

In determining whether authority has been given by Congress to issue suspension orders based upon past violations of the regulations, we must look for an implied power. Admittedly, no express power has been given in the statute. If the suspension orders are penalties or are substantially penalties the right to issue them will not be readily implied. On the contrary, a person may not be subjected to them unless the words of the statute plainly impose them. *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356, 362; *Tiffany* v. *National Bank of Missouri*, 18 Wall. 409, 410. See *B. Simon Hardware Co.* v. *Nelson*, 52 F. Supp. 474, in which Mr. Justice Bailey, who decided the instant case, held that the statute in question does not grant the power to issue suspension orders as a penalty. Therefore, the answer to the question as to whether the suspension order prescribed by Procedural Regulation 4 is a penalty determines the answer to the question as to whether authority to issue such suspension orders was given.

The Court below did not determine whether Congress conferred penal authority. Instead, it held that the suspension order in this case was not penal. (R. 69.)

In answering the question as to whether suspension orders are penalties, care is to be exercised in determining the meaning to be ascribed to the terms "penal" and "penalty." As said in *Life and Casualty Co.* v. *Barefield*, 291 U. S. 566, 574, "'Penalty' is a term of varying and uncertain meaning." It comprehends all forms of criminal punishment, including capital punishment. See *United States* v. *Reisinger*, 128 U. S. 398, 402. It also includes the "fair price of the adventure" of defending and losing a lawsuit.

Life and Casualty Co. v. *Barefield, supra.* The meaning to be ascribed to the term depends on whether it is used in a strict or broad sense and on the consequences which follow from its use. As said in *Huntington* v. *Attrill*, 146 U. S. 657, 666-667:

> "In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offence against its laws. *United States* v. *Reisinger*, 128 U. S. 398, 402; *United States* v. *Chouteau*, 102 U. S. 603, 611. But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the 'penal sum' or 'penalty' of a bond. In the words of Chief Justice Marshall: 'In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party.' *Tayloe* v. *Sandiford*, 7 Wheat. 13, 17.
>
> "Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.
>
> "The action of an owner of property against the hundred to recover damages caused by a mob was said by Justices Willes and Buller to be 'penal against the hundred, but certainly remedial as to the sufferer.' *Hyde* v. *Cogan*, 2 Doug. 699, 705, 706. A statute giving the right to recover back money lost at gaming, and, if the loser does not sue within a certain time,

> authorizing a *qui tam* action to be brought by any other person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer * * *."

In that case this Court held that the same liability imposed by statute might not only be considered as penal in one sense of the term and not penal in another, but held that an action or liability could be penal as to the person on whom the liability is imposed and remedial as to the one who recovers upon it. There a judgment was recovered in New York against an officer of a corporation under a New York statute which imposed on the officers and directors of a corporation a personal liability for its debts if they filed false statements as to its condition. Suit was brought on the judgment in Maryland. The Court of Appeals of Maryland refused to enforce the judgment on the ground that it was a penalty. In determining that the New York judgment was not a penalty in its sense that it should be denied full faith and credit, this Court, after distinguishing the different senses in which the terms "penal" and "penalty" are used, said at Page 676:

> "* * * As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. * * *"

The statement of the Court of Appeals (R. 70) that

> "the fact that the suspension order protects the public directly, by allocating oil away from a dealer who was disposed to violate the rationing program and towards other dealers, sharply distinguishes it from fines and penalties"

discloses that that Court considered the terms "penal" and "penalty" in their narrowest sense. In so doing and in

bolstering its conclusion with the decisions cited by it,[1] it failed to apprehend the sense in which the term "penalty" is employed in the rule that penalties will not be readily implied and that a person will not be subjected to them unless the words of the statute plainly impose them.

Thus, in *Hawker* v. *New York*, 170 U. S. 189, relied upon by the Court of Appeals, the question was whether a statute making it a crime for one to practice medicine who had been convicted of a felony was *ex post facto* as to one who had theretofore been so convicted. The rule was well established both before and after *Hawker* v. *New York*, *supra*, that the *ex post facto* prohibition in the Constitution relates only to criminal punishment. *Johannessen* v. *United States*, 225 U. S. 227, 242; *Calder* v. *Bull*, 3 Dall. 386.

A loss or a liability may be penal in character or a penalty without being criminal. This Court has often upheld the constitutional validity of statutes and decisions providing for and assessing penalties without a jury, penalties assessed by a civil proceeding after a criminal adjudication, and penalties sustained only by a preponderance of the evidence. See *Helvering* v. *Mitchell*, 303 U. S. 391. There Mr. Justice Brandeis, particularly in the footnotes, points out the distinction between penalties of such a criminal nature as to fall within the purview of one or more of the constitutional requirements, such as the right to jury trial and proof beyond a reasonable doubt, and "remedial sanctions." He has made it plain that the fact that a liability is in the nature of a "sanction", does not necessarily make it a *criminal* penalty. Therefore, even if *Hawker* v. *New York* were in other respects analogous, the fact that it held the statute not to be *ex post facto*, does not make it authority for the proposition that a suspension order is not sufficiently penal to require plain statutory authorization.

The same criticism is applicable to the citation of *Nelson*

[1] *Hawker* v. *New York*, 170 U. S. 189; *Nelson* v. *Secretary of Agriculture*, 133 F. 2d 453 (C. C. A. 7th); *Wright* v. *Securities & Exchange Commission*, 112 F. 2d 89 (C. C. A. 2d); *Nichols* v. *Secretary of Agriculture*, 131 F. 2d 651 (C. C. A. 1st).

v. *Secretary of Agriculture*, 133 F. 2d 453 (C. C. A. 7th). In that case the question was whether or not Section 6 (b) of the Commodities Exchange Act was constitutional. It was contended there that the section was unconstitutional because the charge and order were criminal in character, and that to give such force to the Commodities Exchange Act was to work a delegation of judicial functions and to violate Sections 1 and 2 of Article III of the Constitution and the Fifth and Sixth Amendments. All that was held was that the order was remedial to the extent that it was not criminal. It is plain that the Court there used "penal" in the same sense as "criminal."

Likewise, in *Wright* v. *Securities and Exchange Commission*, 112 F. 2d 89 (C. C. A. 2d) the point was made that the suspension order involved was a penalty as a basis for the contention that a violation must be proved beyond a reasonable doubt. However, there again the question must have been whether the penalty was a criminal one; for this Court has long held that a penalty assessed in a civil action or by an administrative officer need not be proved beyond a reasonable doubt. *United States* v. *Regan*, 232 U. S. 37; *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329. See *Oceanic Navigation Company* v. *Stranahan*, 214 U. S. 320, 337-338. In *Lloyd Sabaudo Societa* v. *Elting* this Court held, as in *Wright* v. *Securities and Exchange Commission*, *supra*, that if there is some evidence to support the findings of the administrative officer, his ruling could not be disturbed.

The terms "penal" and "penalty" were not used in *Nichols* v. *Secretary of Agriculture*, 131 F. 2d 651 (C. C. A. 1st). All that was determined was that the suspension power there in question was not *primarily* punishment for a past offense but a necessary power clearly given to the Secretary of Agriculture. It is to be noted that in that case as in *Wright* v. *Securities & Exchange Commission*, *supra*, and *Nelson* v. *Secretary of Agriculture*, *supra*, the statute clearly and unmistakably gave to the administrative officers the power to issue the orders. The question as to

whether the orders had a sufficiently penal character that they must have been expressly provided for by the statute was not present in any of the decisions.

The decision of the Court of Appeals that the suspension order in this case was not a penalty, is, therefore, unsupported by any decision refusing to classify a suspension order as a penalty where the question of the existence of statutory authorization is presented. It is proposed, therefore, to analyze the nature of the suspension order prescribed by Procedural Regulation 4 and to demonstrate that it is penal to the extent that clear statutory authority must be found for it.

Penal Characteristics of the Suspension Order Prescribed by Procedural Regulation 4

Brown v. *Wilemon* (C. C. A. 5th), 139 F. 2d 730, 732, describes the tribunals prescribed by Procedural Regulation 4 as "an elaborate system of quasi-courts." The characterization is an apt one. All of the incidents of a quasi-judicial proceeding, namely, written charges, the right to counsel, the provisions as to rules of evidence, subpoenas, findings of fact and of law, and appeals, are provided for.

More important, however, is the fact that the proceedings are instituted by a notice of hearing issued by the regional attorney, containing a "statement of the *charges against the respondent* and a statement of the purpose for which the hearing is to be held." (Secs. 1300.152 and 1300.153, R. 14.) The regulation provides in Sec. 1300.165 (R. 17) that if the Hearing Commissioner determines that a respondent has violated a rationing regulations or order he may issue a suspension order. A suspension order is defined in Sec. 1300.180 (f) (R. 22) as

> "an order which regulates or prohibits, for a period, the sale, transfer, delivery or other disposition or the acquisition or use of commodities or facilities, and which is issued against a person who *has acted* in vio-

lation of a rationing order or regulation." (Italics supplied.)

Rationing orders or regulations within the meaning of Procedural Regulation 4 are confined by Sec. 1300.180 (d) to those issued by the Office of Price Administration. It will be contended by the Respondents that the suspension order proceedings are a means of protecting the rationing program by allowing rationed commodities to be allocated only to the "trustworthy." It is true that past actions are one of the tests by which the future may be determined, and a survey of a person's past actions is one of the means commonly employed to determine his present character and capabilities. However, there is to be found, neither in Procedural Regulation 4 nor in any other regulation of the Office of Price Administration applicable to the situation presented by this case, any test of character, trustworthiness, or capability except violations of the orders of the Office of Price Administration alone. A felon just released from the penitentiary after serving a sentence for the worst imaginable crime is eligible to act as a dealer in fuel oil both under Procedural Regulation 4 and Ration Order No. 11. He may be known to be actively engaged in a conspiracy to violate Ration Order No. 11, but Procedural Regulation 4 affords no means to prevent his continuing to deal in fuel oil until his overt acts have been committed. He may have been found to have been guilty either by a court or by an administrative tribunal of violating the priorities regulations of the War Production Board or guilty of violating any legislation or regulations for the prosecution of the war, and still be free from any suspension order proceedings under Procedural Regulation 4.

It is further to be noted that neither the Hearing Commissioner nor the Hearing Administrator is required to make any finding as to whether the violations are of the type which would be apt to recur or whether the alleged violator would be apt to continue in his violations. Under Procedural Regulation 4, an excusable minor inadvertent

infraction of the rationing regulations can be the basis of an order denying the violator food, heat, shoes, gasoline, and the right, or privilege, of dealing in any rationed commodity. Of course, it will be protested that a Hearing Commissioner probably would not visit such dire results upon an excusable minor violator. However, the inquiry here is not into the motive of a particular Hearing Commissioner or Hearing Administrator but is an examination of the powers which Procedural Regulation 4 itself sets forth.

Procedural Regulation 4 was followed in the instant case. The violations were alleged to have occurred throughout an entire heating season, namely, from November 1, 1942, to early June, 1943. The proceedings were not instituted until August 9, 1943, two months after the occurrence of the last alleged violation and nine months after the firts alleged violation. If the violations had been substantial, supportable by legal evidence and of a nature likely to recur, the logical preventative remedial procedure would have been the obtaining of an injunction authorized by the Act. No injunction was sought. No criminal proceedings were instituted. Instead, the Office of Price Administration waited until the ration year had expired, and then compiled all of its charges.

It is likewise worthy of note that no violations in the present rationing year or heating season have been claimed to exist at any stage of the proceedings. With another heating season drawing to a close, and no violations claimed, it is difficult to maintain the proposition that the order is for the prevention of future violations.

It is true that the decision of the Hearing Administrator stated (R. 50):

> "We have no way of knowing how many customers the respondent corporation can serve while at the same time faithfully observing the rationing regulations. But we do know from its clearly established violations from the very inception of fuel-oil rationing that the number it then served approached the upper limit of

its capacity since the fact is clear that it did not (whether it would not or could not) thereafter both service this number and simultaneously comply with the rationing regulations. Additional customers, then, clearly impose a burden which the respondent cannot bear."

When the statement above quoted and the suspension order are compared in the light of admitted facts, it will be readily seen that the order was not a mere attempt to fix the amount of business which the Petitioner could serve and at the same time faithfully observe the rationing regulations. Had that been the purpose of the order, the order would simply have provided that the Petitioner should sell only the amount of fuel oil it sold during the pre-rationing year. It is believed the Respondents will concede that the order leaves to the Petitioner neither the number of customers nor the gallonage which the Petitioner enjoyed in the pre-rationing year. It is believed it will be admitted that the turnover of customers will preclude that possibility. It is believed it will be admitted that a great number of the cash customers of the pre-rationing year will be lost. The order, therefore, cannot be construed as an attempt merely to limit the Petitioner's business to that which it can properly handle and at the same time comply with the rationing regulations. Likewise it would be difficult to connect sales to the Government with wrongdoing or to characterize such sales as a danger to the rationing program. The order is mere punishment for violations which an administrative officer presumably believed to have occurred.

The Characteristics of Suspension Orders Prescribed by Procedural Regulation 4 and Here Applied are Sufficiently Penal that Statutory Authority to Issue Them Must Clearly Appear.

"Personal disabilities imposed by the law of a State, as an incident or consequence of a judicial sentence or decree, by way of punishment of an offender, and not for the benefit of any other person (private suitor)—such as attainder,

or infamy, or *incompetency of a convict to testify,* or *disqualification of the guilty party to a cause of divorce for adultery to marry again,* are doubtless strictly *penal,* and therefore have no extra-territorial operation." *Huntington* v. *Attrill,* 146 U. S. 657, 673 (italics and matter in parentheses supplied). The parallel between the disqualification of convicts to testify, prohibiting an adulterer to remarry, and a suspension order of the type here in question is obvious. All are for the protection of the public at large. None is for the benefit of a private individual. All involve personal disabilities. Yet *Huntington* v. *Attrill* recognizes that statutes providing disabilities much less penal in nature are to be strictly construed.

Brown v. *Wilemon,* 139 F. (2d) 730, 732, attempts to distinguish a suspension order from a penalty by saying:

> "Punishment or penalty in America consists in taking life, liberty, or property. A suspension order takes neither. The dealer's personal liberty is untouched. Nothing that is really his is taken from him. His filling station is unmolested and may be used to sell things other than gasolene, and to service cars. Even his gasolene is not taken from him. He is prohibited for a brief period from distributing it or from getting any more. There is damage by the interruption of his business, but damnum absque injuria. His private interest has merely come into collision with a public interest, and has had to yield."

This statement is strikingly similar to the contention made by the Attorney General in *Cummings* v. *Missouri,* 4 Wall. 277, at 320. There the Court said:

> "The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all.' The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from

outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. *The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.*" (Italics supplied.)

This Court further said at 321-322:

"The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. *Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.*" (Italics supplied.)

The Respondents seek to limit the effect of *Cummings* v. *Missouri* by referring to the statement in *Hawker* v. *New York*, 170 U. S. 189, 198, to the effect that *Cummings* v. *Missouri*, and *Ex parte Garland*, 4 Wall. 333, merely hold that many of the matters provided for in the oaths had no relation to the fitness or qualification of a priest or attorney. In the first place, this attempt at limiting the effect of *Cummings* v. *Missouri* and *Ex parte Garland* was not done by unanimous agreement of the Court. It was dissented to by three judges at Page 203. Moreover, as demonstrated, *supra*, the question in *Hawker* v. *New York* was whether there was additional *criminal* punishment. That this Court in *Hawker* v. *New York* recognized that disqualification from a profession is penal though not *criminal* punishment, even where the misconduct does relate to the offender's professional qualifications, is demonstrated by its citation of *Ex parte Wall*, 107 U. S. 265. It is plain from *Ex parte Wall* that while disbarment is not a criminal proceeding, requiring criminal prosecution, the disbarment for

misconduct is nonetheless penal in nature. In that case at Page 273 this Court cites with approval the following language from Archbold's Practice:

> "The court will, in general, interfere in this summary way to *strike an attorney* off the roll, *or otherwise punish him* for gross misconduct, not only in cases where the misconduct has arisen in the course of a suit, or other regular and ordinary business of an attorney, but where it has arisen in any other matter so connected with his professional character as to afford a fair presumption that he was employed in or intrusted with it in consequence of that character." (Italics supplied.)

The disbarment of an attorney has been characterized by this Court in *Helvering* v. *Mitchell*, 303 U. S. 391, 399, as a remedial *sanction*. There this Court, in describing the various types of remedial sanctions, states that one which is characteristically free of the punitive *criminal* element is revocation of a privilege voluntarily granted. Suspension orders, although not criminal punishment, fall within the classification of remedial sanctions. Any sanction, however, is penal by the very definition of the term.

This Court has held much less drastic consequences than the suspension of the right to do business as penal. Thus, in *Champlain Ref. Co.* v. *Corporation Commission*, 286 U. S. 210, 240, it was held that a provision in a statute prohibiting the production of petroleum under wasteful conditions, and providing that where violations occurred the offenders' producing property should be placed in the hands of a receiver to operate the wells and market the product, was highly penal. It was contended there by the State that liability to receivership could be extended to violations of regulations of an administrative commission. In answer to that contention this Court said:

> "* * * The language (of the statute) used applies to violations of the Act and does not extend to violations of orders of the Commission. It is plain and leaves no room for construction. *A direct and unambiguous expression would be required to warrant an*

inference that the State Legislature intended to authorize the seizure of producers' wells and the sale of their oil for a mere violation of an order.

"The context and language used unmistakably show that the section imposes a penalty and is not a measure in the nature of, or an aid of remedy by, injunction to prevent future violations * * *" (Italics and matter in parentheses supplied.)

If putting an offender's oil well in the hands of a receiver so that it might be properly operated is penal, how much more so is an order, based solely on past violations, which completely prohibits the use and operation of a violator's facilities.

The question as to whether a suspension order issued for past violations is sufficiently penal that authority therefor will not be implied is completely answered by the decision of this Court in *Wallace* v. *Cutten*, 298 U. S. 229, 236. There this Court held that the Commodities Exchange Act was remedial, not punitive, and therefore, could not be construed to extend an authority to suspend for present violations to an authority to suspend for past violations. See also *United States ex rel. Daly* v. *Macfarland*, 28 App. D. C. 552.

Moreover, Congress itself has recognized that the stoppage of the supply of rationed commodities brought about as a result of the violation of rationing orders or regulations issued pursuant to the statute in question is a penalty. When the Federal Reports Act of 1942, act of December 24, 1942, c. 811 (56 Stat. 1078) U. S. C. A. Title 5, Sec. 139 f), was before the House of Representatives, Section 8 did not appear in the bill as introduced or as reported by the committee. Congressman Smith of Virginia offered from the floor an amendment which, after several changes, became Section 8.[2] The amendment offered by him read as follows:

"Any person failing to furnish information required by any such agency shall be subject to such penalties as are specifically prescribed by law and no other penalty shall be imposed, either by way of fine, or imprison-

[2] Congressional Record, Volume 88, Part 7, Page 9164.

ment, or by the withdrawal or denial of any right, privilege, priority, allotment, or immunity, afforded to any other person."

In offering the amendment, Congressman Smith explained:

"* * * It does seem to me, in fairness to our citizens, that we should put a limitation on the right of these agencies to prescribe particular *criminal penalties or penalties of any kind,* outside of those prescribed by the Congress, for the violation or for the failure to file replies to these questionnaires. For instance, we see in the papers that Mr. Henderson is going to take the gasoline away from us if we happen to get caught driving over 35 miles an hour. (Italics supplied.)

* * * * * * * * *

"The same thing pertains to whether you shall have any oil to heat your home this winter. They send you a questionnaire * * *. If you do not happen to do that or if you do not do it right, what can that agency do to you by way of penalty? I want to fix it in this law so that they cannot do anything to me except what the law prescribes."

That the author of the amendment had in mind the revocation of privileges is further manifested when he made the following response to a question:

"Yes, but then they take away certain privileges, and you may lose your priorities or your right to buy some gasoline or an automobile or some tires. *That is what I am trying to get at.*" (Italics supplied.)

The amendment, as introduced by Congressman Smith was carried in the House. It was amended in conference to the language now appearing in the statute as follows:

"Any person failing to furnish information required by any such agency shall be subject to such penalties as are specifically prescribed by law and no other penalty shall be imposed either by way of fine or imprisonment or by the withdrawal or denial of any right, privilege, priority, allotment, or immunity, except when the

right, privilege, priority, allotment, or immunity, is legally conditioned on facts which would be revealed by the information requested."

When the Conference Report was read in the House,[3] Congressman Smith immediately inquired as to whether the conference amendments changed the meaning of the amendment offered by him. He was assured that the conference amendments merely were for the purpose of clarification in order that the Government might refuse to issue or allot rationed products, when the issuance depended upon the answers to questions which the applicant refused to give. Immediately, however, Congressman Hoffman described his understanding of what the Office of Price Administration was then doing. He said:

"• • • Take this matter of fuel oil. The citizen is asked in the questionnaire how many gallons he burns for example, over a certain period. He does not know. The farmer is asked, when he applies for gasoline for his truck, or in order to get tires, how many miles his truck traveled over a certain period. He does not know. Now, unable to answer, or answering falsely, he is liable to a penalty of $10,000, or 5 years. That ought to be enough; but, in addition to that, if he does not answer even though he cannot, he can be denied fuel oil for his house; he can be denied gasoline for his truck. So they can put into these questionnaires as many questions as they wish, subject only to the supervision of the Director of the Budget, if this bill goes through.

"I do not want to go on record as approving any such practice because when we give a department authority to issue these questionnaires they go on indefinitely with questions and then deny the man his fuel, his sugar, his tires because he cannot tell them how old Ann is or why George did not do something. I do not want to go on record as sanctioning anything of that kind."

In response, the Manager on the part of the House, Congressman Whittington, replied:

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[3] Congressional Record, Volume 88, Part 7, Pages 9434 et seq.

"I will say in response to the gentleman's statement that to effectuate the gentleman's purpose and to carry out his intention I believe the best thing the Congress can do is to adopt this report."

With these assurances given, the conference amendment was adopted. Congress, therefore, has clearly understood that suspension orders, based on previous violations, are penalties. In employing the language:

"and no other penalty shall be imposed either by way of fine or imprisonment *or by withdrawal or denial of any right, privilege, priority, allotment*, or immunity . . ."

it plainly stamped suspension orders as penal.

III.

Dealers in Rationed Commodities Are Not "Agents", "Licensees", or "Quasi-Licensees". The Penal Characteristics of Suspension Orders and the Consequences of These Characteristics Are Not Avoided by Giving Dealers Such Designations: and Even if Dealers Might Properly be Termed "Agents" or "Licensees" Authority to Terminate Their Rights by Way of Punishment for Past Misdeeds is not Given.

At the outset of this portion of the argument, issue must be taken with the statements on Page 10 of the Memorandum for the United States on the Petition for Certiorari, summarizing Petitioner's position. Petitioner does not and has not contended that the power in question is one of "license" or else a "penalty." Petitioner does note the fact that most of the decisions upholding the authority of the Office of Price Administration do so on a theory that dealers are either licensees or agents and contends that the reasoning which adopts that theory is fallacious.

The Memorandum for the United States at Page 10 makes the statement that neither the District Court nor the Court of Appeals had indicated in this case that any license to do

business or governmental power to buy and sell forms the foundation for the suspension order. The Petition for Certiorari made no claim that either of the lower Courts in this case expressly expounded any such theory. The Petition for Certiorari did, however, on Page 12, cite the opinion of the District Court as authority for the statement on the same page of the Petition that "They (the Courts upholding suspension orders) urge that a dealer is an 'agent' or 'licensee' whose agency or license may be revoked for violation." This citation was amply justified. Mr. Justice Bailey stated (R. 61):

> "* * * If the *agency* which the O.P.A. may authorize to distribute the materials or facilities misuses its authority and privileges and violates the regulations promulgated for its guidance and control, I see no reason why the O. P. A. should not revoke the allocations to and powers of the *agency*." (Italics supplied.)

Likewise, Mr. Justice Bailey, without repeating the decision in *Brown* v. *Wilemon, supra,* adopted its reasoning. He said (R. 61):

> "I agree in general with the reasoning of the Circuit Court of Appeals of the Fifth Circuit in its opinion recently handed down in the case of Brown, Admr. v. Wilemon (Williams) et al."

The theory that suspension orders could be upheld by terming dealers as "agents" of the Office of Price Administration, was not the result of unsuggested original reasoning on the part either of the District Court here or of the Circuit Court of Appeals of the Fifth Circuit in *Brown* v. *Wilemon.* On Pages 18-20 of the brief submitted for the Administrator in *Brown* v. *Wilemon,* is found an explanation of the allocation plan adopted by the Office of Price Administration. The explanation is too long for repetition here. However, it is worthy of note that the following statement is there made:

> "* * * To achieve these results the Administrator might have established a new method of distributing

vital shortage commodities, *for example, through Government outlets.* This would have enabled him to maintain rigid control over the flow of such products as gasoline and to avoid diversion of these goods in the process of distribution to the consumer. It is true that if the Administrator had set up his own distribution system independent dealers doing business in rationed products would have found themselves without their peacetime livelihoods. That would not have been an unusual effect of war since a substantial share of our men have long since abandoned peacetime pursuits and profits. The Administrator has found, however, that a less drastic change in ordinary marketing is consistent with equitable allocation. He has authorized use of existing distribution channels but has imposed a system of control to prevent waste, diversion, and injustice. The plan adopted permits all trustworthy persons to deal in rationed goods. It further assumes, as an initial matter, that all persons are trustworthy and will carry out their duties in a zealous and diligent fashion. But the Administrator is keenly aware of his role as trustee for the public of critical shortage commodities and of his duty to assure every consumer of his just share of these goods. Therefore, *the plan adopted permits dealers to act as distributing agents for the Administrator* only so long as they continue to meet the conditions of eligibility set up in the initial allocation. This means that when the Administrator determines that a person does not meet the conditions of trustworthiness and responsibility essential for the preservation of the public welfare he may allocate away from that distributor, or in other words reallocate to others who are more likely to see that the flow to consumers is not diverted * * *." (Italics supplied.)

Again on Page 29 of the same brief the following appears:

"* * * Likewise, at the retail level a similar power must be implied to eliminate certain persons *as agents for the Government in delivering scarce goods to the consumers.* There is nothing novel about an implied grant of power in such circumstances. *It is much the same as an implication of power to revoke a license,*

> and, in addition, is supported by the rule of construction that the effectuation of a granted power may necessitate the implication of authority. * * * (Italics supplied)

The brief submitted in *Brown* v. *Wilemon* was submitted to the District Court by the Respondents in this case as a portion of their Memorandum. Moreover, in the Court of Appeals the identical language appears on Pages 12-13 and Page 14a of the Respondent's typewritten brief.

The Office of Price Administration has pitched its claim of power on the theory of agency not only before the Courts but before Congressional committees and before the public. The Second Intermediate Report of the Select Committee to Investigate Executive Agencies, H. Rep. 862, 78th Cong., 1st Sess., termed suspension orders as penalties and sharply criticized their use. The Office of Price Administration prepared a written statement in answer to the Committee, which was not only used before the Committee, but was widely publicized by the Office of Price Administration. As part of its answer to the Committee's charge on Page 13 of the Committee report that "there is no statutory basis for the issuance of suspension orders against violators of rationing regulations," there appears on page 21 of the Statement of the Office of Price Administration, the following:

> "The validity of the Administrator's position becomes even more evident when it is recognized that, in a practical sense, the effect of setting up a rationing system is to make private dealers the agents of the Government for the distribution of rationed commodities."

The employment of a theory that an agency or license is involved was not a gratuitous argument. Although fallacious, it was necessary. To attempt to answer the question involved in this case merely by a statement that "the power to allocate includes the power to reallocate or put an end to the allocation" would be a vain gesture. Admittedly, the

power to reallocate or to put an end to an allocation is included in the power to allocate. This does not mean, however, that the power either to allocate, reallocate, or to put an end to an allocation is without limit. The power to allocate given by the statute is broad and properly should be construed to make effective the purpose of Congress. Confessedly, the President and his delegates must determine the classes of persons and uses whose needs are the greatest, and the President and his delegates are the sole judges as to which uses are more essential to the national defense. On the other hand, however, no Court would say that the President is authorized to allocate only to those who support his party policies, or to put an end to an allocation merely because the recipient is of the colored race, or to reallocate only to those who are his personal friends. The power does have limits. The question here is whether the admittedly broad powers of allocation can be used as a means of punishment of the offender when Congress has plainly indicated other penal and remedial measures.

Because of the fact that the powers granted by the Act are not without limits, and because of the fact that penal authority will not be implied, it is necessary to find a method of reasoning which will remove the odium of penalties from suspension orders. The theory of licensing and of agency appears at first blush to accomplish this end.

It is notable that none of the decisions characterizing a dealer as an agent or licensee cite authority for their designation. The Act itself makes no mention of the licensing power. Neither does it refer to any agency. These decisions generally cite two reasons for their conclusions. The first is that the legislation was enacted during wartime and must be broadly construed. See *Perkins* v. *Brown*, 53 F. Supp., 176, 179. The other reason is an allegation that the Government has the power to buy and sell and that if, instead of so doing or setting up its own buying and selling agencies, it chose to allow dealers to remain in business, the dealers' activities became a privilege which could be

withdrawn as to any one dealer when the Executive was satisfied that that dealer was an offender.

The proposition that the Act can be loosely construed is denied by its history. The Act of June 28, 1940 (54 Stat. 676) had been administered for ten months before the Priorities and Allocations Act of 1941 (55 Stat. 236) was introduced. The language of the Priorities and Allocations Act was suggested by the Office of Production Management which had been administering the prior act. See Hearings, House Committee on Naval Affairs, April 28, 1941, on H. R. 4534, Pages 990 *et seq.* The language suggested was practical with that of the Priorities and Allocations Act as it passed Congress. In none of the hearings and reports is there any mention of a licensing power or agency.[4]

The Priorities and Allocations Act of 1941 had in turn been administered for more than six months before the Second War Powers Act was introduced. The language of the allocation sentence was practically unchanged; but criminal and civil proceedings were requested by the Attorney General and provided in the Act. Title III of the Second War Powers Act cannot, therefore, be characterized as hasty wartime legislation. It must be concluded that the licensing power was neither requested nor given.

The proposition that the Act cannot be loosely construed to give a licensing power and that the licensing power was not given is fortified when it is remembered that even in emergencies Congress has been aware of the utility of this power. In Section 5 of the Lever Act, Act of August 10, 1917, c. 53 (40 Stat. 276), Congress expressly gave the President the power to license the dealing in necessaries. Further, in the Emergency Price Control Act of 1942 which was before Congress at the same period of the present emergency as was the Second War Powers Act, Congress

[4] Hearing on H. R. 4534 before House Committee on Naval Affairs, April 28, 1941; House Report No. 460, 77th Cong., 1st Sess.; Hearings, Senate Committee on Military Affairs on H. R. 4534, May 14, 1941; Senate Report No. 309, 77th Cong., 1st Sess.

gave the licensing power to the Office of Price Administration. The history of the Emergency Price Control Act shows that the then Administrator and the then General Counsel of the Office of Price Administration recognized not only the utility of the licensing power but the necessity of express provision for it in the statute. They recommended a licensing power before the House Committee on Banking and Currency. When the bill as it passed the House was silent as to licensing, they appeared before the Senate Committee on Banking and Currency and urged that the licensing power be included. The Act, as passed, does include the licensing power; but the revocation of license is surrounded by safeguards, and is reserved to the courts.

Neither is there any warrant for the implication of an agency. In the argument of the Respondents in their brief in the Court of Appeals here and the argument of the Administrator in his brief in *Brown v. Wilemon*, *supra*, quoted *supra*, 28-29, the theory of agency is based upon an assumption that "to achieve these results the Administrator might have established a new method of distributing vital shortage commodities, for example, through Government outlets." If this were done, the Government would be in the business of buying and selling commodities, as are dealers. Had the Office of Price Administration attempted any such method it would have run afoul not only of the statute in question but of Article IV, Section 3 of the Constitution. At the time the Emergency Price Control Act of 1942 was before the Senate Committee on Banking and Currency, the General Counsel of the Office of Price Administration filed a brief with the Committee, in which several pages were devoted to the proposition that the power to buy and sell must be expressly given, and demonstrated that previous legislation failed to give that power. See Hearings, Senate Committee on Banking and Currency, 77th Cong., 1st Sess. on H. R. 5990, at pages 239, 242, *et seq.* The Senate Committee Report, No. 931, 77th Cong., 2d Sess., likewise recog-

nized that the power to sell must be expressly given. There the statement is made that:

> "* * * The power to sell Government property is limited under the Constitution, and must be expressly granted by Congress (art. 4, sec. 3). Accordingly, before buying and selling can be undertaken by a Governmental agency, specific and clear-cut authority must be found, particularly as to the power to sell below the purchase price."

In the Emergency Price Control Act the power to buy and sell was given in Section 2. However, the power was sharply circumscribed by Section 2 (h) reading as follows:

> "The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under *this Act*." (Italics supplied)

Dealers are in the business of buying and selling. The suspension order here in question prohibits delivery of fuel oil to the Petitioner for resale or transfer. If a dealer is an agent, the subject of the agency must be buying and selling, and he must be performing the act of buying and selling on behalf of his principal. When an alleged principal has no authority to buy or sell, there is no agency.

The Respondents now attempt to avoid the effects of proof that there is no agency by stating that "it matters little to the position of the Government whether dealing in rationed commodities be termed a privilege or a conditional right." See Memorandum for the United States on Petition for Writ of Certiorari at Page 11. However, this refusal to name the status of a dealer does not aid the Respondents' position. Where Congress has expressly utilized licenses in other statutes, as above demonstrated, and failed to utilize here, and presumably purposely failed to utilize the licensing power, it would be a plain perversion

to bring about the same effect by exercising the rights of the grantor of a license and call the operation some other name.

It is true that there are other revocable powers or privileges than those of a license, and the revocation of a privilege voluntarily granted may be free from a punitive *criminal* element. Examples of these are set forth in *Helvering v. Mitchell, supra,* at page 399. However, in every case which has come to Counsel's attention, whatever the privilege may have been called, Congress has expressly provided the means of revocation.

Moreover, regardless of the terminology to be applied to the right to do business, the statutes giving the right to suspend the doing of business are to be strictly construed. *Wallace* v. *Cutten,* 298 U. S. 229; *United States ex rel. Daly* v. *Macfarland,* 28 App. D. C. 552. Even where the power to suspend or limit is plain the question remains whether it "has been exercised as a means for the infliction of punishment." *Ex Parte Garland,* 4 Wall. 333, 380.

The importance of the fact that Congress provided for licenses and revocations in the Emergency Price Control Act, but did not do so in the Second War Powers Act, cannot be too strongly stressed. To hold that the power to license and revoke licenses is vested in the Executive under Title III of the Second War Powers Act, not only can, but has, resulted in a perversion of the congressional intent which has already been noticed by Congress. On November 15, 1943, the House of Representatives Select Committee to Investigate Executive Agencies issued a report,[5] which disclosed that instead of bringing revocation proceedings in the courts for price violations, the Office of Price Administration adopted the device of inserting in their ration rules and regulations provisions prohibiting the dealers in rationed commodities from selling above the ceiling

[5] Second Intermediate Report of the Select Committee to Investigate Executive Agencies, House Report No. 862, 78th Cong., 1st Sess., Pages 18-19.

price. When such a dealer violated the ceiling price, no court proceedings were instituted against him to revoke his license under the Emergency Price Control Act, but the Office of Price Administration would issue a suspension order under Procedural Regulation 4 on the ground that the violation of a ceiling price was *ipso facto* a violation of the ration rules and regulations. As disclosed by the report, during a five-month period, 392 suspension orders were issued based solely on price violations, while during that same period, and one month beyond, only ten license suspension proceedings had been instituted in the courts.[6]

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[6] In the Petition for Certiorari the statement was made at Page 19 that the Government, in *Hamner* v. *United States*, 134 F. 2d 592, 594 (C. C. A. 5th), argued "that the rationing regulations created an offense by imposing as a penalty on violators an inability to get more tires." The quotation was taken directly from the opinion. Since the granting of the Petition for Certiorari, the Office of Price Administration has made available to counsel for the Petitioner a copy of the Government's brief in *Hamner* v. *United States*. It appears that the argument was not made by the Government, but that the brief merely recited a portion of the District Court's opinion, which did make the argument. Therefore, this brief does not attempt to tax the executive branch of the Government with having made it.

Ordinarily, one should be able safely to rely on the recitals of contentions set forth in opinions. However, in that case, as in this, it seemingly would be unsafe to do so. Although no constitutional contention was raised in the District Court in the instant case, it would appear from a reading of the opinion (R. 61) that the constitutional issue had been raised. In their brief in the Court of Appeals, counsel attempted to make it clear beyond the possibility of a doubt that the question of constitutional power to delegate was not in issue, and stated that the Petitioner conceded that Congress could have granted authority to issue suspension orders had it desired so to do. At the outset of the oral argument in the Court of Appeals the statement was repeated that no question was raised as to the power of Congress to delegate authority to issue suspension orders. Despite these precautions, it would appear from the opinion in *The Country Garden Market, Inc.* v. *Bowles, et al.*, ... F. 2d ...., ... U. S. App. D. C. ...., No. 8693, decided March 6, 1944, that the point "that the powers delegated to the Office of Price Administration constitute an unconstitutional delegation of legislative power" was decided adversely in this case.

IV.

Congress Did Not Ratify a Practice of Issuing Suspension Orders.

The theory of congressional ratification of an administrative interpretation was rejected in *B. Simon Hardware Co.* v. *Nelson*, 52 F. Supp. 474. The Court of Appeals in the instant case states that the practice of issuing such orders was brought to the attention of Congress when the Second War Powers Act was under consideration. Even the Respondents did not make so strong a statement in their brief in the Court of Appeals. It is true that the Attorney General and the General Counsel for the Office of Price Administration both said that the penalty of withdrawing priorities *could* be invoked, but neither of them said that such a penalty *had* been invoked. The Attorney General did infer that administrative penalties were invoked in the last war, but as above shown, *supra*, the Lever Act contained the licensing power and gave to the Government the right to buy and sell fuel. It is to be noted that the Attorney General did not refer to suspension orders; and most certainly he did not refer to suspension orders based on past conduct alone. Instead he used the present tense, "violating."[7] However, even by giving to the re-

[7] The Attorney General filed a statement with both the Senate and House Judiciary Committees setting forth the purpose and necessity of the Second War Powers Act. The pertinent portion of his statement with respect to Title III reads:

> "Investigations conducted by the Priorities Division of the Office of Production Management indicate violations of priorities and allocations orders are widespread and serious. It is true that there are various administrative sanctions available to the Office of Production Management. Fuel and power might be cut off to a factory violating the priorities order as was done during the World War on several occasions. But administrative sanctions, although highly important, do not provide an adequate remedy in all cases. For example at a time when airplane production is vitally needed, it would not facilitate war production to curtail the supply of aluminum to an airplane company and thus close the plant.

marks of the Attorney General the broadest implications, a ratification cannot be spelled out. There is no showing of ambiguity in the statute itself. The interpretation was not of long standing. See *Iselin* v. *United States*, 270 U. S. 245, 251. Neither can an interpretation supply omissions in the statute. *Wallace* v. *Cutten*, 298 U. S. 229, 237. See *United States* v. *Weitzel*, 246 U. S. 533, 542-543.

CONCLUSION.

It is respectfully submitted that this Court will find upon comparing the powers assumed by Procedural Regulation 4 with those granted by Title III of the Second War Powers Act that the admonition set forth in *Palmer* v. *Massachusetts* and quoted *supra*, 11, has not been heeded. The attempted interpretation of the statute by the Office of Price Administration has become creation, with the result that Procedural Regulation 4 is legislation itself. The result has been, not only in the instant case but in numberless others, that an alleged offender against the regulations has been tried, found guilty, and punished by an administrative court which Congress has not created and subjected to penalties which Congress has not imposed.

The attempted justification is a recital of the offenses alleged to have been committed, of which an administrative officer was satisfied. In an inquiry as to the validity of the entire proceedings for the Office of Price Administration, this Court is asked to consider the administrative officer's findings as having the verity of a court judgment or an expressly authorized administrative finding. In the instant case this verity is sought even though it appears from the

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"The civil and criminal remedies provided are intended to supply the means whereby priorities orders and allocations can be enforced when administrative sanction are not appropriate."

See Hearings before the Committee on the Judiciary, House of Representatives, 77th Cong., 2d Sess., on S. 2208, January 30 and February 2, 1942.

record that the administrative officers differed. It is obvious from the pleadings that the truth or falsity of the findings is not in issue. Petitioner does not attempt to warp an inquiry as to the authorization for the proceedings into a proceeding to disprove the facts found at the termination of those proceedings. If the proceedings were unauthorized, the factual determination resulting therefrom was of no more consequence than a conclusion of any private citizen. On the other hand, to cite the conclusions arrived at by the Hearing Administrator as a basis of determining their verity is to beg the question.

All that is sought by the Petitioner in this case is the right to defend the charges against it by the means which Congress has prescribed in the Statute; that is, either before a jury in a criminal case or before a judge in an injunction proceedings, by a tribunal that is not simultaneously judge and prosecutor and employing the legal rules of evidence.

The Office of Price Administration has usurped a power which was not given, as a result of which the Petitioner will suffer a punishment not authorized, and on evidence which the Office of Price Administration has not desired to submit to a court. The decision of the Courts below, therefore, should be reversed.

Respectfully submitted,

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APPENDIX.

Title III, Second War Powers Act of 1942 (56 Stat. 176), U. S. C. A., Title 50, App., Sec. 633.

TITLE III—PRIORITIES POWERS.

SEC. 301. Subsection (a) of section 2 of the Act of June 28, 1940 (54 Stat. 676), entitled "An Act to expedite national defense, and for other purposes", as amended by the Act of May 31, 1941 (Public Law Numbered 89, Seventy-seventh Congress), is hereby amended to read as follows:

"SEC. 2. (a) (1) That whenever deemed by the President of the United States to be in the best interests of the national defense during the national emergency declared by the President on September 8, 1939, to exist, the Secretary of the Navy is hereby authorized to negotiate contracts for the acquisition, construction, repair, or alteration of complete naval vessels or aircraft, or any portion thereof, including plans, spare parts, and equipment therefor, that have been or may be authorized, and also for machine tools and other similar equipment, with or without advertising or competitive bidding upon determination that the price is fair and reasonable. Deliveries of material under all orders placed pursuant to the authority of this paragraph and all other naval contracts or orders and deliveries of material under all Army contracts or orders shall, in the discretion of the President, take priority over all deliveries for private account or for export: *Provided*, That the Secretary of the Navy shall report every three months to the Congress the contracts entered into under the authority of this paragraph: *Provided further*, That contracts negotiated pursuant to the provisions of this paragraph shall not be deemed to be contracts for the purchase of such materials, supplies, articles, or equipment as may usually be bought in the open market within the meaning of section 9 of the Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes', approved June 30, 1936 (49 Stat. 2036; U. S. C., Supp. V, title 41, secs. 35-45): *Provided further*, That nothing herein contained shall relieve a bidder or contractor of the obligation to furnish the bonds under the requirements of the Act of August 24, 1935 (49 Stat. 793, 40 U. S. C. 270 (a) to (d)): *Provided further*, That the cost-plus-a-percentage-of-cost system of contract-

ing shall not be used under the authority granted by this paragraph to negotiate contracts; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of the Navy: *And provided further*, That the fixed fee to be paid the contractor as a result of any contract entered into under the authority of this paragraph, or any War Department contract entered into in the form of cost-plus-a-fixed-fee, shall not exceed 7 per centum of the estimated cost of the contract (exclusive of the fee as determined by the Secretary of the Navy or the Secretary of War, as the case may be).

"(2) Deliveries of material to which priority may be assigned pursuant to paragraph (1) shall include, in addition to deliveries of material under contracts or orders of the Army or Navy, deliveries of material under—

"(A) Contracts or orders for the government of any country whose defense the President deems vital to the defense of the United States under the terms of the Act of March 11, 1941, entitled 'An Act to promote the defense of the United States';

"(B) Contracts or orders which the President shall deem necessary or appropriate to promote the defense of the United States;

"(C) Subcontracts or suborders which the President shall deem necessary or appropriate to the fulfillment of any contract or order as specified in this subsection (a).

Deliveries under any contract or order specified in this subsection (a) may be assigned priority over deliveries under any other contract or order; and the President may require acceptance of and performance under such contracts or orders in preference to other contracts or orders for the purpose of assuring such priority. Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

"(3) The President shall be entitled to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, any person (which, for the purpose of this subsection (a), shall include any individual, partnership, association, business trust, corporation, or any organized group of persons, whether incorporated or not), and make such investigations, as may be necessary or appropriate, in his discretion, to the enforcement or administration of the provisions of this subsection (a).

"(4) For the purpose of obtaining any information, verifying any report required, or making any investigation pursuant to paragraph (3), the President may administer oaths and affirmations, and may require by subpena or otherwise the attendance and testimony of witnesses and the production of any books or records or any other documentary or physical evidence which may be relevant to the inquiry. Such attendance and testimony of witnesses and the production of such books, records, or other documentary or physical evidence may be required at any designated place from any State, Territory, or other place subject to the jurisdiction of the United States: *Provided*, That the production of a person's books, records, or other documentary evidence shall not be required at any place other than the place where such person resides or transacts business, if, prior to the return date specified in the subpena issued with respect thereto, such person furnishes the President with a true copy of such books, records, or other documentary evidence (certified by such person under oath to be a true and correct copy) or enters into a stipulation with the President as to the information contained in such books, records, or other documentary evidence. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. No person shall be excused from attending and testifying or from producing any books, records, or other documentary evidence or certified copies thereof or physical evidence in obedience to any such subpena, or in any action or proceeding which may be instituted under this subsection (a), on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be subject to prosecution and punishment or to any penalty or forfeiture

for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that any such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. The President shall not publish or disclose any information obtained under this paragraph which the President deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the President determines that the withholding thereof is contrary to the interest of the national defense and security; and anyone violating this provision shall be guilty of a felony and upon conviction thereof shall be fined not exceeding $1,000, or be imprisoned not exceeding two years, or both.

"(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

"(6) The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States and the courts of the Philippine Islands shall have jurisdiction of violations of this subsection (a) or any rule, regulation, or order or subpena thereunder, whether heretofore or hereafter issued, and of all civil actions under this subsection (a) to enforce any liability or duty created by, or to enjoin any violation of, this subsection (a) or any rule, regulation, order, or subpena thereunder whether heretofore or hereafter issued. Any criminal proceeding on account of any such violation may be brought in any district in which any act, failure to act, or transaction constituting the violation occurred. Any such civil action may be brought in any such district or in the district in which the defendant resides or transacts business. Process in such cases, criminal or civil may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found; and subpena for witnesses who are required to attend a court in any district in any such case may run into any other district. No costs shall be assessed

against the United States in any proceeding under this subsection (a).

"(7) No person shall be held liable for damages or penalties for any default under any contract or order which shall result directly or indirectly from compliance with this subsection (a) or any rule, regulation, or order issued thereunder, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid.

"(8) The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 793

L. P. STEUART & BRO., INC., *Petitioner*,

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

PETITIONER'S REPLY BRIEF.

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Counsel for Petitioner.

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PETITIONER'S REPLY BRIEF.

INTRODUCTION.

Because of the short period of time between the granting of the writ and the hearing, coupled with the wartime shortage of help and curtailing of printing services, it was impossible for counsel for either the Petitioner or the Respondents to prepare and file briefs within the time prescribed by the rules. The result is that Petitioner was served with a proof of the proposed brief of the Respondents on April 25, 1944, less than a week before the hearing and only three days from the time a brief must be in the hands of the printer if the Petitioner's reply brief is to be filed by the time of the hearing.

Counsel for Petitioner, therefore, are adopting the expedient of filing a brief which confessedly is incomplete; and trust that this Court will not only forgive its obvious defects of form and expression but realize that lack of time has prevented it from being complete. It is the purpose of this reply brief merely to stress a few of what counsel believe to be

fundamental errors in the Respondents' method of solution of the question before the Court, and to point out the consequences following upon these errors.

SUMMARY OF ARGUMENT.

In their presentation of the facts, Respondents have failed to observe their stipulation that for the purposes of this case facts well pleaded by any party should be considered as true; have treated as facts statements set forth in exhibits, namely, certain findings of the Hearing Administrator, merely because the Petitioner has not denied them in its complaint (although the issues do not call for denial of such statements); and have, without the foundation of a pleading, treated as definitely established facts matters not appearing in the record and not found by the administrative officers. The result has been an attempted creation of an atmosphere wherein the Petitioner would appear to be a ruthless malefactor and wherein the suspension order, instead of being penal, is a mere deprivation of illegal gains.

The necessity of inquiry as to whether the suspension order prescribed by Procedural Regulation 4 and issued in this case is penal cannot be avoided because of the fact that "penalty" is a word of wide meaning, and that precision can be attained only by linking the term with the proceeding or liability sought to be characterized by it. There are many instances in the law where legal terms have variable meanings, dependent upon the circumstances in which they are used and the relation or proceeding under inquiry.

Whether or not suspension orders defined by Procedural Regulation 4 are penal is not determined by the state of mind of particular Hearing Administrators or Hearing Commissioners.

The congressional ratification claimed by the Respondents lacks both of two necessary elements, first that the statute be

ambiguous, and second that the interpretation be of long standing or notorious. It further falls afoul of the rule that interpretation cannot supply omissions.

ARGUMENT.

I.

Errors in Presentation of the Facts.

The first error in the factual presentation is an oversight either of the stipulation set forth in the judgment of the District Court or of the consequences of the stipulation. The judgment (R. 62-63) contains the following recitation:

> "Upon said hearing plaintiffs and defendants moved orally for summary judgment upon the ground that there were no material issues of fact to be tried *and all parties consented that for the purpose of this case all material facts well pleaded in either pleading be taken as true;* that there is no claim *in the complaint* that there was no substantial evidence to support the order of the Hearing Administrator, and that the order to be entered herein be a final one upon said oral motions of the parties." (Italics supplied)

The above-quoted excerpt of the judgment shows what took place in these proceedings. No evidence was taken. The motion for summary judgment was the equivalent of a general demurrer at common law or a motion to dismiss in equity under the old rules. At all times in this case celerity of final adjudication has been deemed essential and the above-quoted excerpt from the judgment was inserted by both parties to expedite the appeal, to make known to the Appellate Courts the fact that this case was not disposed of on questions of evidence, and to obviate the delay incidental to preparing findings of fact.

In the face of the stipulation referred to in the judgment and the obvious consequences attendant upon an oral motion for judgment unaccompanied by affidavit or tendered issue of

fact (that is, that the averments of the adversary pleading must be treated as true), the Respondents have asserted, as facts, matters not appearing in their pleadings and now seek to deny or question the existence of facts which their stipulation admitted. Their brief is replete with examples of ignoring the consequences of the stipulation and the motion for summary judgment.

One of these examples occurs in Footnote 10 on Page 9 of the Respondents' brief, reading as follows:

> "Although petitioner claims it made a large investment in additional facilities prior to the heating season of 1942-1943 (R. 2), according to its own declaration its fuel oil storage capacity at the end of the season was only 16,850 gallons (R. 42). Petrol Corporation, prior to its suspension for violations, including sales to petitioner without coupons, had a storage capacity in Washington of at least 3,405,810 gallons (R. 42). Petitioner did not contend, and we are confident was not able to contend, that these facilities have been idle."

The above-quoted footnote is for the obvious purpose of denying a fact well pleaded in the complaint. It is illustrative of the vices inherent in attempting to avoid the necessary effect of a stipulation or of a motion for judgmnet on the pleadings, namely, that all facts well pleaded by the adversary must be conceded to be true. For this reason it will be analyzed in some detail, to demonstrate the effects following upon the vice. Had the Petitioner been called upon to prove the averments obliquely denied by the footnote above quoted, it could have shown the fact that Petitioner has storage facilities for 5,000,000 gallons of fuel oil, which immediately prior to the heating season of 1942-43 were leased to its supplier, Petrol Corporation; that Petitioner and Petrol Corporation canceled the lease in the summer of 1943, and the 5,000,000 gallon capacity of storage is now not only owned but possessed by the Petitioner.

Petitioner could further show by indisputable proof that among its storage facilities were those for 80,000 barrels of

distillate fuel oil or Bunker "C" fuel oil, equipped with steam coils to permit of ready transfer of storage facilities from distillates to bunker and, in addition, 50,000 barrels of storage space for Bunker "C" fuel oil. It could show that Petitioner's plant was designed and equipped with a tank car siding capable of unloading forty-two tank cars at one shift (the approximate equivalent of two full train lots in twenty-fours) and that it is the only terminal in the District of Columbia qualified as to its ability and capacity to store and handle the volume of fuel oil handled by it. In proof of the existence of these facilities and of their vital necessity to the Government it could supply correspondence from the Government's own files, among them a letter from Robert E. Allen, Assistant Deputy Petroleum Coordinator, to the Reconstruction Finance Corporation, setting forth most of the above facts in connection with a proposed loan by the Reconstruction Finance Corporation, and stressing the fact that the facilities were

> "most essential to the solution of the petroleum supply problem which confronts this nation in the affected areas of the Atlantic Seaboard and with particular emphasis on the District of Columbia and the Army requirements adjacent to this territory."

The footnote further failed to explain why the Petitioner's declaration of fuel oil storage capacity set forth only 16,850 gallons, although the reason is well known to the Respondents. The reason is that Petrol Corporation, being the lessee of the storage facilities, declared them. The figure 16,850 gallons quoted in the footnote was the capacity merely of the Petitioner's delivery trucks. The statement,

> "Petitioner did not contend, and we are confident was not able to contend, that these facilities have been idle,"

is sufficiently answered by calling the attention of the Court to the fact that the suspension order has never been made effective by reason of the temporary restraining order obtained at the outset of the litigation.

The above factual statements made by Petitioner are not made for the purpose of proving the averments of the complaint. They are made merely for the purpose of illustrating the gross injustice which can result when obliquely, and by innuendo, an impression is sought to be created at variance with the direct averments of pleadings, which at this posture of the case, are assumed to be true.

Another example appears on Pages 37 and 38 of the Respondents' brief. In referring to the allegations of the complaint as to the turnover in customers and lack of record as to cash customers in the pre-rationing year, the Respondents complain because these allegations are used as factual statements, and attempt to refute them. A perusal of Paragraph 9 of the complaint will show that the factual statements were well pleaded, and it must, therefore, be assumed that there is a turnover of approximately fifteen to twenty percent per year. Parenthetically, counsel for Respondents during the oral argument before the Court of Appeals admitted this to be a fact, generally. As to the lack of record of cash customers, again the fact is well pleaded that the Petitioner's records are incomplete for the pre-rationing year. The Respondents' brief, however, states on Page 38 as a fact that the administrative record shows Petitioner had a separate card in its files for each customer served, neglecting to state that the testimony therein referred to related to records kept since rationing went into effect. The Respondents further propose in their Footnote 31 on Page 38 a scheme for obtaining the names of the customers which would entail an examination of every application for fuel oil in the District of Columbia and vicinity. It is doubtful whether, under the regulations, a ration board would be permitted to allow a dealer to make such an examination of its files. Even if it could, the magnitude of such a task can be better imagined than described.

Again, on Page 41 of their brief the Respondents refer to an "expansion achieved through flouting ration rules." There is no such averment made by their answer. There is no such

statement made by the Hearing Administrator, or by the Hearing Commissioner. The result is that, without pleading or proof, an impression is attempted where the suspension order would seem to be merely the withholding from the Petitioner of ill-gotten gains. This is a contradiction of the facts averred in the complaint that:

> "The other retail fuel oil dealers serving the District of Columbia and vicinity failed and neglected to expand their facilities as requested by the Petroleum Administrator for War as aforesaid, and, by reasons of the plaintiff's compliance with the recommendations of the said Petroleum Administrator for War the plaintiff during the heating season of 1942-1943, was, and now is better able to serve the retail purchasing public, and the Government of the United States, with fuel oil than are the plaintiff's competitors."

Further, had the Respondents' answer made the averment that Petitioner's expansion was "achieved through flouting ration rules," Petitioner could have replied with the additional averment (which it could prove) that a cause for expanded business in addition to those set forth in the complaint was the purchase of a competitor's business, facilities and good will.

The second error consists of treating as facts findings of the Hearing Administrator merely because the Petitioner did not deny them in the complaint or say that they were unsupported by substantial evidence. In the first place, Respondents in their answer have not said either that the findings were true or that they were supported by substantial evidence. In *Wilemon, et al.* v. *Brown,* No. 854 in this Court (*Brown* v. *Wilemon,* 139 F. 2d 730) the record discloses that the Office of Price Administration in that case did at least aver that the Hearing Administrator's findings were based upon substantial evidence.

Inasmuch as the sole question is the statutory authority of the Office of Price Administration to entertain proceedings looking to the issuance of a suspension order, the validity of

the findings depends on the jurisdiction of the Office of Price Administration to entertain the proceedings and issue the order. This is not a proceeding to review the findings of the Hearing Administrator. If it were, the appropriate pleadings would have been made by both sides. Even in such a proceeding, moreover, the standards of review have not been authoritatively determined.[1] The fact that no standards of

[1] Respondents seemingly take the view that in a judicial review of the findings here in question, the facts found by a Hearing Administrator must be sustained if supported by substantial evidence. It is true that in review of many of the various administrative tribunals functioning under various statutes, that rule has been applied. However, it is by no means of universal application. The scope of judicial review depends largely on the statute creating the administrative agency or the statute which the administrative agency is to administer. Here, as in discussing penalties, the Respondents have utilized what is described in the Preface to Frankfurter and Davison's Cases on Administrative Law, as a horizontal view. The Respondents have fallen into the generalizations warned against in that Preface. The pertinent language of the Preface, subject to errors in rewriting from shorthand notes, is as follows:

> "Administrative law is groping; it is dealing with new problems, calling for new social inventions or fresh adaptations of old experiences. To be sure, administrative law is not a wholly new phenomenon. But in their range and permeating influence, we are dealing with new juristic forces. In a field as vast and unruly as is contemporary administrative law we must be wary against premature generalization and merely formal system. Administrative law is markedly influenced by the specific interests entrusted to a particular administrative organ, as well as by the characteristics in history, structure and enveloping environment of the particular organ of regulation. And so 'judicial review' is not a conception even tolerably well defined in scope, nor a process having substantially the same elements whenever courts review the action of administrative bodies. Therefore, the problems subsumed by 'judicial review' or 'administrative discretion' must be dealt with organically; they must be related to the implications of the particular interests that invoke a 'judicial review' or as to which 'administrative discretion' is exercised. In short, for the scientific development of administrative law, a subject like 'judicial review' must be studied not only horizontally but vertically; we must explore not 'judicial review' generally or miscellaneously, but 'judicial review' of Federal Trade Com-

review are fixed in the Act is, however, an indication that no such proceedings were contemplated by Congress.

In the present status of the case, however, authority or jurisdiction is the sole question. If the proceedings and the suspension orders were authorized, it is conceded that, until set aside on review, findings of fact therein made must be accepted. On the other hand, if the proceedings were not authorized they were of no effect whatever.[2]

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mission orders, 'judicial review' of postal fraud orders, 'judicial review' of deportation orders. 'Judicial review' in Federal Trade Commission cases, for instance, is affected by totally different assumptions, conscious and unconscious, from those which govern courts when reviewing orders of the Interstate Commerce Commission. Likewise 'judicial review' in postal cases is under the sway of the whole structure of which it forms a part, just as 'judicial review' in Land Office cases or in immigration cases derives significance from the agency which is reviewed not less than from the nature of the subject matter under review.

"One cannot, therefore, stress too much the tentative stages of hypothesis and generalization in administrative law, and the predominant importance of knowing the anatomy and physiology of the lawmaking agencies that are neither legislature nor courts but partake of the functions of both. * * *"

[2] This rule, although of long standing, is not obsolete. It was reiterated on April 10, 1944, by the United States Court of Appeals for the District of Columbia in *Rowe* v. *Nolan Finance Company*, No. 8573, decided April 10, 1944. The *per curiam* opinion of the Court follows:

"PER CURIAM: Appellant filed a complaint in the District Court in which she alleged that she had borrowed $262.80 from appellees on a note and had given a deed of trust on an automobile as security; that this transaction was fraudulent and usurious; and that appellees seized the car upon appellant's default in a payment on the note. Appellant demanded damages in an aggregate amount of $2,000, an order that appellees disclose the state of the account between the parties, and an injunction against sale of the car. The court rightly dismissed the complaint on the ground that the amount in controversy was not sufficient to give the court jurisdiction. Suits "in which the claimed value of personal property or the debt or damages claimed" does not exceed $3,000 are now in the exclusive jurisdiction of the Municipal Court for the District of Columbia. D. C. Code (1940, Supp. II) § 11-755, 56

The third type of error in the factual presentation consists of treating as definitely established facts, without the foundation of averments in a pleading, matters neither appearing in the record, nor found by the administrative officers. Perhaps the most glaring example of this occurs on Pages 6 and 7 of the Respondents' brief wherein they refer to the finding by the Hearing Administrator of the receipt by Petitioner of 5,548,972 gallons of fuel oil without surrendering to its supplier any ration coupons, exchange certificates, or the like. It is true the Hearing Administrattor made such a finding. Not content with this, however, the brief continues:

> "It was not a question of delay; Petitioner had never surrendered such coupons."

The impression is thereby made that the coupons were never surrendered. Had the coupons or other ration evidences been surrendered in the way prescribed by the regulations to Petitioner's supplier, Petrol Corporation, they would eventually find their way to the Office of Price Administration. It appears, however, that they must have been turned over directly to the Office of Price Administration. The Hearing Administrator states (R. 45):

> "When respondent's failure to give Petrol Corporation ration currency for fuel oil transfers came to the attention of the Enforcement Division and an investigation of respondent's activities became necessary, respondent turned over to the District Enforcement attorneys a number of cartons filled with unsorted fuel oil ration coupons of all denominations. Though requested by the Office of Price Administration to assist with these coupons, both in their count and in supervision of the count, respondent refused

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Stat. 192, ch. 207, § 4; *Klepinger* v. *Rhodes*, U. S. App. D. C. , F. 2d , decided February 11, 1944.

"Though the court dismissed the complaint for lack of jurisdiction, it undertook to make findings upon the merits. *These findings are without effect.* Dismissal is without prejudice to the enforcement in the Municipal Court of any claim which appellant may have." (Italics supplied.)

to do so. Under these circumstances the count was made by employees of the Office of Price Administration."

The delivery of the coupons to the attorneys for the Office of Price Administration took place in April or May of 1943. They were returned at the conclusion of the hearings before the Hearing Commissioner, with the statement that the Office of Price Administration had no further use for them. It is true that the Hearing Administrator found a delay in the surrendering of coupons far beyond that allowed by the regulations. It is further true that he found no facts in excuse. The inference, however, that they have never been turned over is absolutely unwarranted. The coupons were delivered to and audited by the Office of Price Administration.

II.

The Necessity of Inquiry as to Whether the Suspension Order Prescribed by Procedural Regulation 4 Is Penal Cannot be Avoided Because "Penalty" Is a Word of Wide Meaning

Both in the summary at Page 11 and in the argument at Page 27 the Respondents criticize inquiry as to whether a suspension order is penal in determining whether it is authorized. They take exception to endeavoring to define the concept of "penalty." Likewise, on Page 32 they take exception to the fact that Procedural Regulation 4 has been analyzed.

The difficulties encountered by the varied meanings of terms in the nomenclature of jurisprudence does not avoid the necessity of using them and applying them to particular situations. One of the most familiar examples which comes readily to mind is the word "fixture." Whether the law would characterize a particular article as a fixture in many instances depends on whether the conflicting claims are between landlord and tenant, between vendor and purchaser, or between heir-at-law and next-of-kin. The concept of a fixture is not limited by the physical characteristics alone.

The excerpt from the Preface of Frankfurter and Davison's Cases on Administrative Law quoted in Note 1, *supra*. 8, is appropriate here. Generalization is imprudent in defining "penalty" as well as attempting to make sweeping generalizations as to "judicial review." Compare the majority and concurring opinions in *United States ex rel Marcus* v. *Hess*, 217 U. S. 537, 548-552, 553.

The review and analysis of Procedural Regulation 4 made in the Petitioner's brief was for the purpose of supplying the vertical as well as the horizontal view to the question as to whether the suspension order is a penalty. It was an attempt to make known "the anatomy and physiology of the agency and the proceeding." It was, perhaps, ineptly done. But at least it avoided the dangers of sweeping generalization made by citing *Hawker* v. *New York*, *Nichols* v. *Secretary of Agriculture*, *Nelson* v. *Secretary of Agriculture*, and *Wright* v. *Securities and Exchange Commission*, as proof that no penalty was involved.

It is worthy of note that Respondents have not been able to supply in their brief an instance where a Court has ever held that a suspension order of the type here in question was so lacking in penal characteristics that authority to issue it could be implied.

III.

Whether or not Suspension Orders Defined by Procedural Regulation 4 Are Penal Is not Determined by the State of Mind of Particular Hearing Administrators or Hearing Commissioners

The citation of cases from the dockets of the Office of Price Administration, not appearing in the Federal Register or in a reporting service, is of little help. What may have been in the minds of various Hearing Commissioners or Hearing Administrators, whether expressed or unexpressed, is not determinative. Other Hearing Commissioners and other Hearing Administrators may well think differently.

If such authorities are cited to prove the proposition that

suspension orders are not penal, the testimony now being taken by a sub-committee of the House Interstate and Foreign Commerce Committee could be cited to the contrary. However, citing of instances where Hearing Administrators have been fair and citing of instances where they may have been unfair does not determine whether a suspension order as defined by Procedural Regulation 4 is penal. We must look to Procedural Regulation 4 itself. Under that regulation, suspension order proceedings are brought on a charge of violation and the suspension order by its definition is visited only upon one who has committed a violation.

IV.

The Necessary Elements of Congressional Ratification Are Lacking

In determining whether or not an interpretation has been ratified by Congress there are several well-known requirements.

The first is that the statute be ambiguous. Reliance by the Respondents on congressional ratification, therefore, displays a lack of confidence in the assertions in other portions of their brief that Congress expressly granted the right to withhold rationed commodities because of prior violations.

The second requirement is that the ratification be well-known either because the interpretation is of long standing or notorious. Admittedly, the administrative interpretation was not of long standing when the Second War Powers Act was passed. Respondents cite thirteen suspension orders issued by the Office of Production Management and the War Production Board prior to the presidential approval of the Second War Powers Act. However, only seven of them were issued prior to the time the Act passed the Senate and had been reported by the House Judiciary Committee. They could not have had the notoriety ascribed to them by the Respondents. If they had, the Attorney General would not have been forced to go back as far as the First World War for an illustration of a comparable administrative sanction. See Page 47 of Re-

spondents' brief. The only other "administrative interpretation" prior to the passage of the Act, consists of a sentence buried in a two-volume transcript of two thousand pages of hearings before the House Committee on Banking and Currency on H. R. 5479, 77th Cong., 1st Sess. (see Footnote 35, Page 45 of Respondents' brief). The statement was made before the House Committee on Banking and Currency which had before it neither the Priorities and Allocations Act of 1941 (House Naval Affairs Committee) nor the Second War Powers Act (House Judiciary Committee). The listing of examples of congressional knowledge set forth in the Respondents' brief speaks more eloquently of the poverty of means of knowledge than it does of knowledge. The Fifth Intermediate Report of the Select Committee to Investigate Executive Agencies, dated April 24, 1944 (House Report No. 1366), at Page 25, reviews similar arguments made before it by the Office of Price Administration and concludes:

> "Congress has been unaware that it has ratified the exercise of powers assumed by the Office of Price Administration in violation of legislative intent and Congress should now make its position clear."

The views of the members of the Petroleum Sub-Committee of the Interstate and Foreign Commerce Committee, House of Representatives, expressed in hearings currently taking place, and as yet unreported, indicate that the members of that Sub-Commitee do not believe Congress has ratified the interpretation of the Office of Price Administration.

CONCLUSION

Suspension orders as defined by Procedural Regulation 4 and of the type issued in the instant case have neither been authorized or ratified by Congress. The decision of the Court below should, therefore, be reversed.

Respectfully submitted,

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FRANCIS C. BROOKE,
Counsel for Petitioner.

MEMORANDUM FOR THE UNITED STATES

FILE COPY

No. 1155

In the Supreme Court of the United States

October Term, 1944

L. P. Steuart & Bro., Inc., Petitioner,

v.

Chester Bowles, Administrator, Office of Price Administration, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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PETITION FOR A WRIT OF CERTIORARI

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 793

L. P. STEUART & BRO., INC., PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the District Court (R. 59–62) and the United States Court of Appeals for the District of Columbia (R. 66–71) are not yet officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on February 18, 1944 (R. 71–72). The petition for a writ of certiorari was filed in this Court on March 15, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the power granted the President by Section 2 (a) of the Act of June 28, 1940, as amended by the Act of May 31, 1941, and by Title III of the Second War Powers Act (Act of March 27, 1942), to allocate materials "in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense," includes the power to limit or withdraw an allocation of a dealer in rationed commodities because he has violated the conditions upon which he was permitted to participate in the allocation system.

STATUTES AND REGULATIONS INVOLVED

The case involves the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (Priorities and Allocations Act) (55 Stat. 236), and by Title III of the Second War Powers Act, 1942 (56 Stat. 176, 50 U. S. C. (Supp. II), sec. 631 et seq.). Section 2 (a) (2) reads, in part:

> * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

Sections 2 (a) (5) and (6) provide for criminal and civil enforcement suits against persons violating the Act or regulations and orders issued thereunder. Section 2 (a) (8) authorizes the President to exercise his powers through such agency or officer as he may direct and in conformity with rules which he may prescribe.

Ration Order No. 11, effective October 22, 1942 (7 Fed. Reg. 8480–8503, as amended), provided for the rationing of fuel oil. Section 1394.5707 required a dealer to surrender ration coupons or other ration evidence within five days after receiving a transfer from his supplier.[1] Section 1394.5652 required the receipt of valid ration evidence by a dealer delivering fuel oil to a consumer. Section 1394.5656 required the dealer to keep certain records of fuel oil sales. Section 1394.5803 provided:

> § 1394.5803. *Suspension orders.* Any person who violates Ration Order No. 11 may, by administrative suspension order, be prohibited from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any fuel oil or other rationed product or facility. Such suspension order shall be issued for such period as in the judgment of the Administrator, or such person as he may designate for such

[1] "Ration evidence" means a token authorized by the Office of Price Administration to represent a right to receive a transfer of a rationed good and exchangeable for such good subject to the conditions set forth in the Ration Order. For the five-day period, see 8 Fed. Reg. 1640; *cf. id.* 14817.

purpose, is necessary or appropriate in the public interest and to promote the national security.[2]

By Executive Order 9125 (7 Fed. Reg. 2719–2720) the President had conferred his power under Section 2 (a) (2) of the Second War Powers Act on the War Production Board and confirmed War Production Board Directive No. 1 (7 Fed. Reg. 562) which lodged in the Office of Price Administration certain of the Board's allocation power under the earlier acts. By supplementary Directive 1–0, the War Production Board had delegated to the Office of Price Administration specific authority over the rationing of fuel oil (7 Fed. Reg. 8418).[3] Ration Order No. 11 was then promulgated.

The Office of Price Administration conferred on its Hearing Commissioners and Hearing Administrator the function of issuing suspension orders. General Order No. 46 (8 Fed. Reg. 1771).

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[2] Effective March 2, 1943, this section was amended to read: "An administrative suspension order may be obtained in accordance with Procedural Regulation No. 4 against any person who violates Ration Order No. 11" (8 Fed. Reg. 2720).

[3] Directive 1–0 contained the following provision: "(b) The authority of the Office of Price Administration under this supplementary directive shall include the power to regulate or prohibit the sale, transfer, delivery or other disposition of fuel oil to, or the acquisition or use of fuel oil by, any person who has acted in violation of any rationing regulation or order prescribed by the Office of Price Administration." A similar provision was contained in Directive 1.

At the same time it adopted procedural regulations governing their issuance. Procedural Regulation No. 4 (8 Fed. Reg. 1744).

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the District of Columbia which affirmed the judgment of the district court (R. 62) granting respondents' motion for summary judgment, denying petitioner's motion for temporary injunction, and dismissing its complaint.

On January 7, 1944, the petitioner brought suit in the district court to enjoin enforcement of a suspension order issued by the Office of Price Administration on December 31, 1943, restricting the petitioner's dealings in fuel oil. Petitioner is a retail dealer in various kinds of fuel oil in the District of Columbia. On August 9, 1943, the Office of Price Administration commenced proceedings, under Procedural Regulation No. 4, to determine whether a suspension order should be issued against petitioner. A Notice of Hearing was served charging 227 violations of Ration Order No. 11 (R. 23). Pursuant to the Notice, a hearing was held on these charges before a Hearing Commissioner, terminating on October 22, 1943. On November 8, 1943, the Hearing Commissioner issued a suspension order (R. 32). Both sides appealed to the Hearing Administrator from the terms of this suspension. On Decem-

ber 31, 1943, after full argument and review, the Hearing Administrator issued his Decision on Appeal (R. 41). As the Court of Appeals noted (R. 67), petitioner's complaint does not deny that the evidence supported the findings of the Hearing Administrator. These findings must therefore be accepted as true.

The Hearing Administrator found that the petitioner had received transfers of 5,548,972 gallons of fuel oil without surrendering in exchange to its supplier, Petrol Corporation, any ration coupons, exchange certificates, or any other form of ration evidence (R. 43–44). This was clearly contrary to Ration Order No. 11, which required surrender of such evidence promptly.[4] It was not a question of delay; petitioner had never surrendered such coupons. In addition, the Hearing Administrator determined that upon comparison of all available counts of the coupons received by petitioner and the sales made by it, a shortage of coupons appeared representing approximately 181,000 gallons according to the petitioner's own calculation, and 328,640 gallons according to the Office of Price Administration's count, which showed that petitioner had not always received coupons in exchange for fuel oil delivered to its customers (R. 45–47).[5] He likewise found at least 13 instances admitted or proved where petitioner

[4] Section 1394.5707.

[5] This was contrary to Sec. 1394.5652 of Ration Order No. 11.

failed to receive valid ration coupons in exchange for fuel oil delivered (R. 47–48). Finally, the Hearing Administrator determined that the petitioner had failed to keep records showing the number and value of all coupons detached and received for fuel oil transferred to consumers (R. 48).[5] He determined that because of the demonstrated untrustworthiness or inability of petitioner to comply with the regulations while serving additional customers, a suspension order should issue.

The suspension order (R. 50–51) prohibited the petitioner from receiving fuel oil for resale or transfer to any consumer, and from transferring fuel oil to any consumer, from January 15, 1944, to December 31, 1944, but provided that if the petitioner should furnish the Office of Price Administration a list of consumers to whom it sold fuel oil from October 21, 1941, to October 21, 1942, and if it should surrender all void ration evidences in its possession, it might continue to receive deliveries of fuel oil sufficient for purposes of resale and transfer to consumers serviced by it between October 21, 1941, and October 21, 1942. The suspension order further provided for an accounting by petitioner of its fuel oil transactions. Finally, in paragraph (c), the order provided that if the Petroleum Administrator for War should certify to the Office of Price Administration that the fuel

[5] This was in violation of Sec. 1394.5656 of the Ration Order.

oil needs of the District of Columbia cannot be met by the supplies and facilities of other dealers and suppliers in the area, and that it is therefore essential to the welfare of the community that the provisions of the suspension be modified, the restrictions imposed might be modified by the Hearing Commissioner on the petition of the District Director of the Office of Price Administration and the petitioner.

The instant suit came on for hearing in the District Court, after respondents had filed an answer (R. 56), on petitioner's motion for a temporary injunction. All parties agreed that the case was controlled by issues of law and consented to disposition of the suit on oral motions of petitioner and respondents for summary judgment (R. 62). The district court ordered the complaint dismissed (R. 62), with an opinion holding that authority to issue the suspension order is included in the statutory power to make allocations (R. 59–62). The Court of Appeals unanimously affirmed (R. 67–71). A restraining order has been continued pending final disposition of the case.

DISCUSSION

The decision of the Court of Appeals in the instant case upholding the suspension order as a valid exercise of the allocation power and its like holding in another case[1] are in accord with the

[1] *Country Garden Markets* v. *Bowles*, App. D. C., March 6, 1944, not yet reported.

only other appellate decision, that of the Circuit Court of Appeals for the Fifth Circuit.[8] Nine United States District Judges in seven Districts have likewise sustained suspension orders.[9] With the exception of the opinions of the District Judge who was reversed by the Circuit Court of Appeals for the Fifth Circuit,[10] there is but one case which may be considered to the contrary, and that by way of a dictum or alternative holding.[11] The question presented is, however, of exceptional public importance. The wide use of the suspension order by a number of Government wartime agencies charged with the allocation function makes a challenge to its basic validity one of vital concern to the administration of the

[8] *Brown* v. *Wilemon*, 139 F. (2d) 730 (C. C. A. 5).

[9] *Perkins* v. *Brown*, 53 F. Supp. 176 (S. D. Ga.); *Pantelco* v. *Brown*, 53 F. Supp. 209 (S. D. N. Y.); *Joliet Oil Corp.* v. *Brown*, N. D. Ill., Dec. 17, 1943, not yet reported; *Gallagher Steak House* v. *Bowles*, S. D. N. Y., Dec. 23, 1943, not yet reported; *Kotson* v. *Ivins*, D. Utah, Jan. 12, 1944; *Arthur L. Means* v. *Bowles*, D. R. I., Jan. 17, 1944; *L. P. Steuart & Bro.* v. *Bowles*, D. D. Col., Jan. 21, 1944, not yet reported; *Country Garden Markets* v. *Bowles*, D. D. Col., Jan. 24, 1944, not yet reported; *Waldera et al.* v. *Bowles*, D. N. D., Jan. 25, 1944.

[10] Prior to reversal of the decision in *Wilemon* v. *Brown*, 51 F. Supp. 978 (W. D. Tex.), Judge Atwell had also decided *Jacobson* v. *Bowles*, 53 F. Supp. 532, which is now pending on appeal.

[11] *Sims* v. *Talbert*, 52 F. Supp. 688 (E. D. S. C.). *B. Simon Hardware Co.* v. *Nelson*, 52 F. Supp. 474 (D. D. Col.), involving a War Production Board suspension order, is a decision of Mr. Justice Bailey which, in upholding the suspension order in the present case, he termed inapplicable. The decision is being appealed.

Second War Powers Act.[12] For these reasons we do not oppose the petition.

We believe, however, that the nature of the controversy involved requires some clarification, in view of petitioner's insistence that the power in question is one of "licensing" or else a "penalty."

The decided cases have had a central theme overlooked by petitioner in its brief. Thus neither the District Court nor the Court of Appeals in the instant case has indicated that any license to do business or Governmental power to buy and sell forms the foundation for the suspension power. On the contrary, the suspension order was justified as an allocation away from a violator to those more trustworthy, or the withdrawal of an allocation.[13] The courts have likewise stressed that the statutory power to allocate on such conditions as are "in the public interest" and "promote the na-

[12] The War Production Board, the War Food Administration, the Petroleum Administration for War, and the Office of Price Administration have issued suspension orders under the Second War Powers Act. As of March 20, 1944, the War Production Board had issued 512 such orders. As of March 1, 1944, the Office of Price Administration had issued 9,007 such orders.

[13] Thus the Court of Appeals stated: "The suspension order is within the President's authority to 'allocate.' As the District Court observed, the power to allocate includes the power to reallocate, or to put an end to an allocation. All allocation has positive and negative aspects. What is allocated to some is allocated away from others. An order is equally an allocation whether it prescribes what A shall receive or, as in the case of this suspension order, what B shall not receive" (R. 68).

tional defense," authorizes the imposition of a condition that violation of the rationing rules will lead to a withdrawal of the allocation." Cf. Ration Order No. 11, *supra*, pp. 3–4.

Although the District Court and the Court of Appeals in the instant case did not use the analogy, some courts have pointed out that an allocation on condition is similar to a license or privilege in which rights do not vest.[15] Petitioner in its brief (pp. 12–17) seeks to characterize these cases as upholding the orders on the theory that the Second War Powers Act conferred a licensing power. Actually the Office of Price Administration has issued no license under its rationing authority. And it matters little to the position of the Government whether dealing in rationed commodities be termed a privilege or a conditional right. The important fact is that the terms of

[14] The Circuit Court of Appeals for the Fifth Circuit stated in the *Wilemon* case, at p. 732: "We do not think a penalty has been ordained or adjudged in such a sense as to require the action of Congress and a court; but that observance of rationing rules may as a matter of administration be made 'a condition' of participation in allocation, as mentioned in the Act * * *."

[15] The court in *Perkins* v. *Brown*, *supra*, observed, at p. 179: "The suspension order is itself an allocation. Rationed commodities are allocated away from the violator for a period deemed reasonable under the circumstances, and at the same time the amount actually or potentially allocable to other and more trustworthy recipients of rationed commodities has been increased. A distributor of gasoline may be likened to a licensee whose license runs during good behavior."

the suspension order are properly related to the carrying out of the allocation power.

Suspension orders are imposed not with the object of punishment but for the protection of the rationing system against waste and diversion. Such orders are not penalties in the legal sense and are nonetheless an allocation because they work a hardship or have a penalizing effect. *Hawker* v. *New York*, 170 U. S. 189, established that a statute which forbade persons convicted of a felony from practicing medicine did not increase the punishment for an offense already committed. The Court held that the statute merely prescribed a qualification for practice of the profession for the protection of the public. The Court rejected the applicability of *Ex Parte Garland*, 4 Wall. 333, and *Cummings* v. *Missouri*, 4 Wall. 277, relied on by petitioner (p. 18), noting that those cases held unlawful test oaths as to past conduct respecting matters which had no connection with the profession of an attorney or a minister from which the parties in the respective cases would be barred.[16]

Where the distinction has been thought important, as for constitutional purposes or for pur-

[16] The Court observed (p. 198): "It was held that, as many of the matters provided for in these oaths had no relation to the fitness or qualification of the two parties, the one to follow the profession of a minister of the gospel and the other to act as an attorney and counselor, the oaths should be considered not legitimate tests of qualification, but in the nature of penalties for past offences."

poses of burden of proof, the courts have held that the suspension or expulsion of a broker from doing business on a stock or commodity exchange by order of a governmental agency is a remedial measure to protect the investing public, and not a penalty. *Wright* v. *Securities & Exchange Commission,* 112 F. (2d) 89 (C. C A. 2); *Nichols & Co.* v. *Secretary of Agriculture,* 131 F. (2d) 651 (C. C. A. 1); *Nelson* v. *Secretary of Agriculture,* 133 F. (2d) 453 (C. C. A. 7).[17] *Wallace* v. *Cutten,* 298 U. S. 229, is not to the contrary, since under the Act there involved the Secretary of Agriculture could suspend only if a person "is violating" the statute. Suspension for past misconduct was therefore held unauthorized. The statute was promptly amended to permit suspension of a person who "is violating" or "has violated" the Act or regulations. The section, as amended, was construed in the *Nichols* and *Nelson* cases, *supra,* as providing for a suspension order that was remedial and not punitive.[18]

[17] The value of these cases as authority for the proposition that a suspension for past violation of the operative law is remedial and not penal is not diminished, as asserted by petitioner (see petitioner's brief, pp. 17, 19–20), by the fact that the suspension power was specifically adverted to in the statute. That has a bearing only on the question whether the power has been granted and not on its nature when exercised.

[18] The Office of Price Administration has never contended in any suit that a suspension order is a penalty. The brief of the United States Attorney in *Hamner* v. *United States,* 134 F. (2d) 592 (C. C. A. 5), does not reveal that he made such

Irrespective of the classification of the suspension order, it is submitted that Congress knew that suspension orders were being issued under the Priorities and Allocations Act as part of the allocation function, did nothing to alter the practice, and in fact affirmatively approved it by passing the Second War Powers Act. See *Perkins* v. *Brown, supra,* pp. 180–181. The administrative construction was announced to Congress by the Attorney General, who asked for the addition of penalty provisions and not their substitution for the suspension power.[19] The power has thus been conferred and confirmed by Congress.

CONCLUSION

The decision below is correct and is in accord with the only other appellate court determination and the great weight of lower court decisions. The question presented is important, and for that reason we do not oppose the petition.

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a contention (see petitioner's brief, p. 19). Both the *Hamner* and *Wilemon* opinions were written by the same Circuit Judge.

[19] See S. Rep. 989, 77th Cong., 2d sess., p. 4; H. Hearings before Committee on the Judiciary on S. 2208, 77th Cong., 2d sess., Jan. 30, 1942, pp. 10–11. The original draft of the Second War Powers Act was prepared by the Department of Justice. See Statement of Attorney General Biddle, H. Hearings before Committee on the Judiciary on S. 2208, p. 8. Title III was proposed to the Department of Justice by Mr. Donald Nelson, Chairman of the War Production Board. Ibid., p. 10.

Respectfully submitted.

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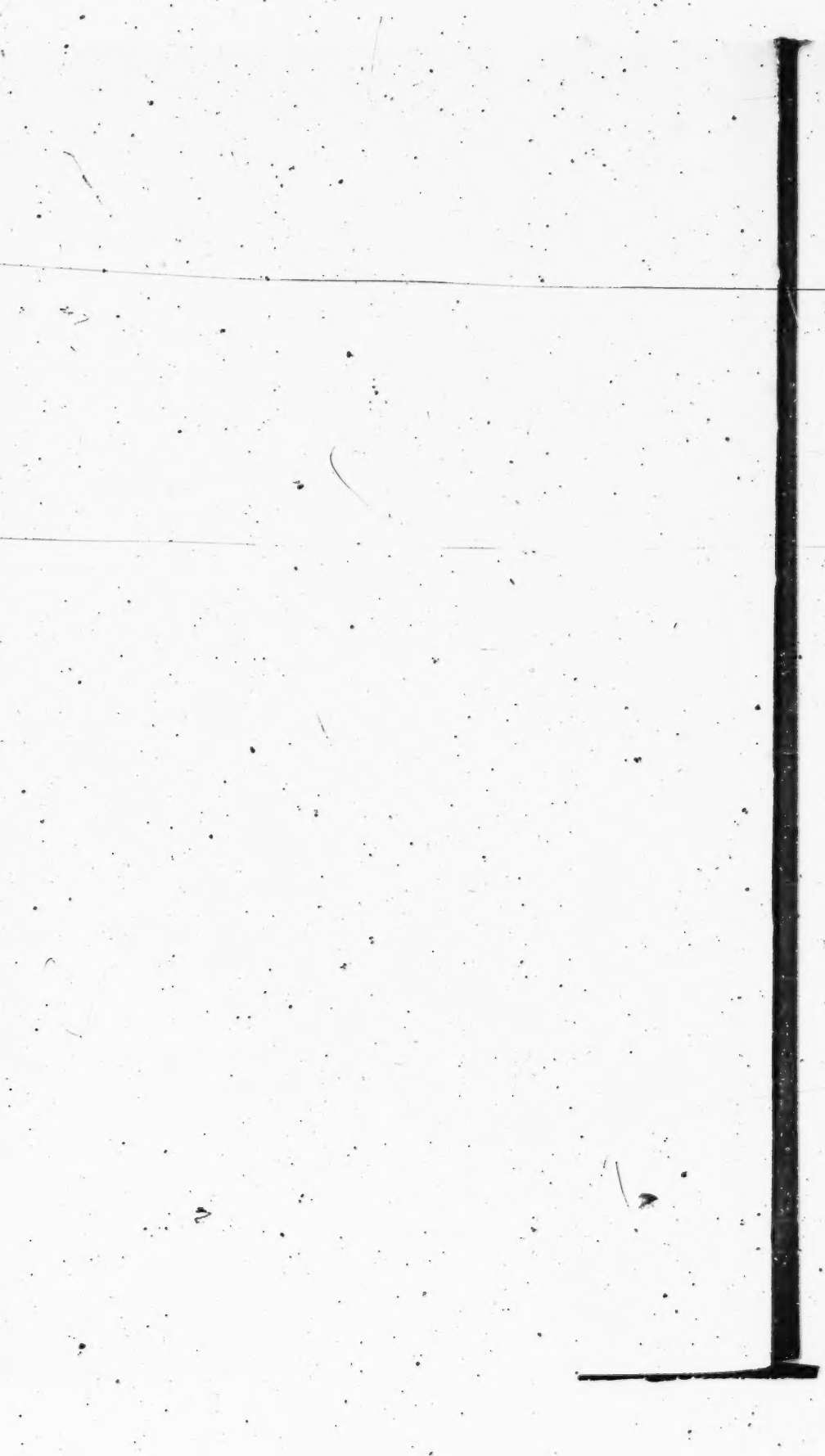

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 793

L. P. STEUART & BRO., INC., PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the District Court (R. 59–62) is not yet officially reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 66–71) is reported in 140 F. (2d) 703.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on February 18, 1944 (R. 71–72). The petition for a writ of certiorari was filed in this Court on March 15, 1944. Certiorari was granted on April 3, 1944.

Jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the power granted the President by Section 2 (a) of the Act of June 28, 1940, as amended by the Act of May 31, 1941, and by Title III of the Second War Powers Act (Act of March 27, 1942), to allocate materials "in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense," includes the power to limit or withdraw an allocation of a dealer in rationed commodities because he has violated the conditions upon which he was permitted to participate in the allocation system.

STATUTES AND REGULATIONS INVOLVED

The case involves the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (Priorities and Allocations Act) (55 Stat. 236), and by Title III of the Second War Powers Act, 1942 (56 Stat. 176, 50 U. S. C. (Supp. II), sec. 631 et seq.). Section 2 (a) (2) reads, in part (the italicized words having been added by the Second War Powers Act):

> * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any

material *or of any facilities* for defense or for private account or for export, the President may allocate such material *or facilities* in such manner, *upon such conditions* and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

Sections 2 (a) (5) and (6) of the Second War Powers Act added provisions for criminal and civil enforcement suits against persons violating the Act or regulations and orders issued thereunder. Section 2 (a) (8) authorizes the President to exercise his powers through such agency or officer as he may direct and in conformity with rules which he may prescribe.

Ration Order No. 11, effective October 22, 1942 (7 Fed. Reg. 8480–8503, as amended), provided for the rationing of fuel oil. Section 1394.5707 required a dealer to surrender ration coupons or other ration evidence within five days after receiving a transfer from his supplier.[1] Section 1394.5652 required the receipt of valid ration evidence by a dealer delivering fuel oil to a consumer. Section 1394.5656 required the dealer to keep certain records of fuel-oil sales. Section 1394.5803 provided:

[1] "Ration evidence" means a token authorized by the Office of Price Administration to represent a right to receive a transfer of a rationed good and exchangeable for such good subject to the conditions set forth in the Ration Order. For the five-day period, see 8 Fed. Reg. 1640; cf. id. 14817.

Suspension orders.—Any person who violates Ration Order No. 11 may, by administrative suspension order, be prohibited from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any fuel oil or other rationed product or facility. Such suspension order shall be issued for such period as in the judgment of the Administrator, or such person as he may designate for such purpose, is necessary or appropriate in the public interest and to promote the national security.[2]

By Executive Order 9125, dated April 7, 1942 (7 Fed. Reg. 2719–2720) the President had conferred his power under Section 2 (a) (2) of the Second War Powers Act on the War Production Board and confirmed War Production Board Directive No. 1 of January 24, 1942 (7 Fed. Reg. 562) which lodged in the Office of Price Administration certain of the Board's allocation power under the earlier acts. By Supplementary Directive 1–0 of October 16, 1942, the War Production Board had delegated to the Office of Price Administration specific authority over the rationing of fuel oil (7 Fed. Reg. 8418).[3] Ration Order No. 11 was then promulgated.

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[2] Effective March 2, 1943, this section was amended to read: "An administrative suspension order may be obtained in accordance with Procedural Regulation No. 4 against any person who violates Ration Order No. 11" (8 Fed. Reg. 2720).

[3] War Production Board Directive No. 1 contained the following provision: "The authority of the Office of Price

The Office of Price Administration conferred on its Hearing Commissioners and Hearing Administrator the function of issuing suspension orders. General Order No. 46 (8 Fed. Reg. 1771). At the same time it adopted procedural regulations governing their issuance. Procedural Regulation No. 4 (8 Fed. Reg. 1744).[4]

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the District of Columbia which affirmed the judgment of the district court (R. 62) granting respondents' motion for summary judgment, denying petitioner's motion for temporary injunction, and dismissing its complaint.

On January 7, 1944, the petitioner brought suit in the district court to enjoin enforcement of a suspension order issued by the Office of Price

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Administration under this Directive shall include the power to regulate or prohibit the sale, transfer or other disposition of products to any retailer who has acted in violation of any rationing regulation or order prescribed by the Office of Price Administration hereunder, and shall include the power to regulate or prohibit the sale, transfer or other disposition of products to any wholesaler or other supplier of any retailer, directly or indirectly, if such wholesaler or other supplier has acted in violation of any rationing regulation or order prescribed by the Office of Price Administration hereunder." A similar provision was contained in Supplementary Directive No. 1-0, dealing specifically with fuel oil.

[4] Procedural Regulation No. 4 was replaced by Revised Procedural Regulation No. 4 (9 Fed. Reg. 2558), effective April 1, 1944.

Administration on December 31, 1943, restricting the petitioner's dealings in fuel oil. Petitioner is a retail dealer in various kinds of fuel oil in the District of Columbia. On August 9, 1943, the Office of Price Administration commenced proceedings, under Procedural Regulation No. 4, to determine whether a suspension order should be issued against petitioner. A Notice of Hearing was served charging 227 violations of Ration Order No. 11 (R. 23). Pursuant to the Notice, a hearing was held on these charges before a Hearing Commissioner, terminating on October 22, 1943. On November 8, 1943, the Hearing Commissioner issued a suspension order (R. 32). Both petitioner and the Enforcement Department appealed to the Hearing Administrator from the terms of this suspension. On December 31, 1943, after full argument and review, the Hearing Administrator issued his Decision on Appeal (R. 41). As the Court of Appeals noted (R. 67), petitioner's complaint does not deny that the evidence supported the findings of the Hearing Administrator. These findings must therefore be accepted as true.

The Hearing Administrator found that the petitioner had received transfers of 5,548,972 gallons of fuel oil without surrendering in exchange to its supplier, Petrol Corporation, any ration coupons, exchange certificates, or any other form of ration evidence (R. 43–44). This was clearly con-

trary to Ration Order No. 11, which required surrender of such evidence promptly.[5] It was not a question of delay; petitioner had never surrendered such coupons. In addition, the Hearing Administrator determined that upon comparison of all available counts of the coupons received by petitioner and the sales made by it, a shortage of coupons appeared representing approximately 181,000 gallons, according to the petitioner's own calculation, and 328,640 gallons according to the Office of Price Administration's count, which showed that petitioner had not always received coupons in exchange for fuel oil delivered to its customers (R. 45–47).[6] He likewise found at least 13 specific instances admitted or proved, where petitioner failed to receive valid ration coupons in exchange for fuel oil delivered (R. 47–48). Finally, the Hearing Administrator determined that the petitioner had failed to keep records showing the number and value of all coupons detached and received for fuel oil transferred to consumers (R. 48).[7] At the time of these violations petitioner was attempting to serve a greatly enlarged list of customers, many of them evidently drawn from other dealers who lacked fuel oil supplies (R. 43). The Administrator determined that because of the demonstrated

[5] Section 1394.5707.

[6] This was contrary to Section 1394.5652 of Ration Order No. 11.

[7] This was in violation of Sec. 1394.5656 of the Ration Order.

untrustforthiness or inability of petitioner to comply with the regulations while serving additional customers, a suspension order should issue. (R. 50).

The suspension order (R. 50–51) prohibited the petitioner from receiving fuel oil for resale or transfer to any consumer, and from transferring fuel oil to any consumer, from January 15, 1944, to December 31, 1944,[8] but provided that if the petitioner should furnish to the Office of Price Administration a list of consumers to whom it sold fuel oil from October 21, 1941, to October 21, 1942, and if it should surrender all void ration evidences in its possession, it might continue to receive deliveries of fuel oil sufficient for purposes of resale and transfer to consumers serviced by it between October 21, 1941, and October 21, 1942.[9] The suspension order further provided for an accounting by petitioner of its fuel oil transactions. Finally, in paragraph (c), the order provided that if the Petroleum Administrator for War should certify to the Office of Price Administration that the fuel oil needs of the District of Columbia cannot be met by the supplies and facilities of other dealers and suppliers in the area, and that it is therefore essential to the welfare of the community that the provisions of the

[8] The Second War Powers Act expires on December 31, 1944.

[9] Ration Order No. 11 became effective October 22, 1942.

suspension be modified, the restrictions imposed might be modified by the Hearing Commissioner on the petition of the District Director of the Office of Price Administration and the petitioner. The suspension order does not prevent the petitioner from leasing or selling any excess storage or other facilities it may own. (Cf. petitioner's brief, p. 8).[10]

The instant suit came on for hearing in the district court, after respondents had filed an answer (R. 56), on petitioner's motion for a temporary injunction. All parties agreed that the case was controlled by issues of law and consented to disposition of the suit on oral motions of petitioner and respondents for summary judgment (R. 62). The district court ordered the complaint dismissed (R. 62), with an opinion holding that authority to issue the suspension order is included in the statutory power to make allocations (R. 59–62). The Court of Appeals unanimously affirmed (R. 67–71). A restrain-

[10] Although petitioner claims it made a large investment in additional facilities prior to the heating season of 1942–1943 (R. 2), according to its own declaration its fuel oil storage capacity at the end of the season was only 16,850 gallons (R. 42). Petrol Corporation, prior to its suspension for violations, including sales to petitioner without coupons, had a storage capacity in Washington of at least 3,405,810 gallons (R. 42). Petitioner did not contend, and we are confident was not able to contend, that these facilities have been idle.

ing order has been continued pending final disposition of the case.

SUMMARY OF ARGUMENT

1. The Second War Powers Act confers on the President, or the agencies designated by him, power to "allocate" materials in such manner and upon such conditions as are deemed necessary or appropriate in the public interest and to promote the national defense. This power includes the power to withdraw allocations and to condition the participation in the distribution of rationed commodities upon evidence of trustworthiness as shown by conformity to the applicable rationing regulation. Ration Order No. 11, here involved, specifically establishes obedience to rationing rules as a condition of continued participation; it provides for suspension orders of the type here in question. It cannot be supposed that Congress intended to exclude this feature in the establishment and operation of a rationing system. So to conclude would be to impute to Congress a mandate that critical materials must be furnished equally to those who have shown flagrant irresponsibility in the distribution or use of such commodities.

The various agencies to which the allocation power has been delegated have regarded the power as including authority to issue suspension orders, and these have in fact been issued in

several thousands of instances. The courts with virtual unanimity have sustained the power.

In establishing a rationing system pursuant to the statute, the administrative agencies might have limited the function of distribution to those who had already demonstrated their responsibility and competence to observe the rationing rules. Instead, the Government has authorized the use of existing distribution channels, but has conditioned the continuance of distribution upon compliance with the rules. Such a condition, established pursuant to express statutory authority to impose conditions, could hardly be more germane. No question is presented of the power to impose conditions unrelated to the safeguarding of the rationing process itself.

Petitioner's argument is largely based on the premise that it is necessary to imply the power to issue suspension orders, and it is further argued that these orders are "penal" and hence the authority may not readily be implied. In fact, however, since the issuance of such orders is an integral part of the allocation process itself, constituting as they do a reallocation, the power is expressly granted, and it is the exclusion of the power which would have to be implied. Moreover, the characterization of the power as penal is not a fruitful method of resolving the question of statutory construction. If the test has any relevance, the order here involved is not penal

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under the standards which have been applied in cases dealing with the suspension of members of learned professions or licensed occupations, where the suspension is based on past misconduct showing unfitness for the particular occupation. In the present case petitioner, by its flagrant violation of the regulations while serving an abnormally large clientele, has shown that to safeguard the rationing process, it may not safely be entrusted with the same responsibility under the same conditions.

2. Congress has been fully informed of the construction of the law and the administrative practice and, in the light of this knowledge, has reenacted the relevant provisions and approved that construction and practice. In enacting the Second War Powers Act of 1942, Congress was informed of the suspension power exercised by the War Production Board under the provisions of the Priorities and Allocations Act of 1941; Congress reenacted those provisions and strengthened them, adding criminal and civil enforcement measures, but not supplanting the suspension power. Subsequently the Federal Reports Act of 1942 forbade the withdrawal of an allocation for failure to furnish information, except where the allocation was legally conditioned on facts which would be revealed by the information requested and refused. This provision constituted a recognition and acceptance of suspension orders except in the area of the prohibition, and

showed also that Congress was able to find apt words to forbid such orders in those instances where it so desired.

ARGUMENT

THE SUSPENSION ORDER IS A VALID EXERCISE OF THE ALLOCATION POWER CONFERRED BY CONGRESS

A. *The suspension order has been authorized by Congress*

1. *The statutory power.*—In the Priorities and Allocations Act of May 31, 1941, confirmed and strengthened by the Second War Powers Act of March 27, 1942, Congress conferred broad power on the President, and agencies designated by him, to establish a system of allocation and priorities. The question here presented is whether that power to "allocate * * * in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense" (*supra*, pp. 2–3) includes the power to issue a so-called suspension order such as that here involved. It is our position that the power granted necessarily includes the power to withdraw an allocation from one who has abused the grant, and to condition the continued participation in the distribution of rationed commodities upon evidence of trustworthiness as shown by conformity to the requirements of the system. A contrary view would indeed be a surprising construction of the

authority and responsibility which the statute conferred. It would mean that the agency responsible for allocation would be obliged to disregard even wanton misuse of critical materials or reckless distribution of them in violation of the system of controls which had been established. That Congress so intended the allocation system to be managed is hardly credible. If it be suggested that the sole recourse in the case of irresponsible participants in the rationing system was intended to be the bringing of criminal and civil suits, the answer is twofold. In the first place, until the enactment of the Second War Powers Act such enforcement measures were not expressly provided, and it cannot be argued that the power to issue suspension orders, though granted in the earlier statute, was withdrawn by implication in the later one;[11] indeed, the Second War Powers Act strengthened the power of allocation by adding the phrase "upon such conditions" in defining the President's power. In the second place, civil and criminal enforcement suits do not discharge the primary responsibility, in administering the rationing process itself, of safeguarding the supply of critical materials through a just, equitable, and reliable system of allocation.

[11] As is shown *infra*, pp. 43–48, the addition of the enforcement measures in the Second War Powers Act was not in substitution for the power of suspension, which was expressly brought to the attention of Congress, but was designed to furnish more comprehensive means of securing compliance.

The issuance of suspension orders has been regarded as an integral part of a system of allocation by the several agencies to which the allocation power in various aspects has been delegated. The War Production Board, the Petroleum Administration for War, the War Food Administration, and the Office of Price Administration all issue such orders. As of March 20, 1944, the War Production Board had issued 512 suspension orders. As of March 1, 1944, the Office of Price Administration had issued 9,007 suspension orders, and had dismissed 1,268 proceedings, while 2,477 proceedings were pending. As early as its Second Quarterly Report to Congress, for the period May 1 to July 31, 1942, the Office of Price Administration pointed out that in that relatively early period 122 suspension orders had been issued. The report stated: "Experience has emphasized the fairness, adaptability, and effectiveness of the suspension order proceeding, and it will be increasingly used." (H. Doc. No. 891, 77th Cong., 2d sess., pp. 83–84.) A more detailed consideration of the issuance of suspension orders, as that practice has been brought to the attention of Congress, will be found in the discussion, *infra*, pp. 43–57, relating to congressional approval and ratification of the practice.

Not only the administrative agencies, but the courts as well, have regarded the power granted by Congress as including the power to issue sus-

pension orders. The decision of the Court of Appeals in the instant case upholding the suspension order as a valid exercise of the allocation power and its like holding in another case [12] are in accord with the only other appellate decision, that of the Circuit Court of Appeals for the Fifth Circuit.[13] Twelve United States District Judges in ten Districts have likewise sustained Office of Price Administration suspension orders.[14] With the exception of the opinions of the District Judge whose decision was reversed by the Circuit Court of Appeals for the Fifth Circuit,[15] there is but one

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[12] *Country Garden Markets* v. *Bowles*, App. D. C., Mar. 6, 1944, not yet reported.

[13] *Brown* v. *Wilemon*, 139 F. (2d) 730 (C. C. A. 5), pending on petition for ceritorari, No. 854, present Term.

[14] *Perkins* v. *Brown*, 53 F. Supp. 176 (S. D. Ga.); *Panteleo* v. *Brown*, 53 F. Supp. 209 (S. D. N. Y.); *Joliet Oil Corp.* v. *Brown*, N. D. Ill., Dec. 17, 1943, not yet reported; *Gallagher Steak House* v. *Bowles*, S. D. N. Y., Dec. 23, 1943, not yet reported; *Kotsos* v. *Ivins*, D. Utah, Jan. 12, 1944; *Arthur L. Means* v. *Bowles*, D. R. I., Jan. 17, 1944; *L. P. Steuart & Bros.* v. *Bowles*, D. D. C., Jan. 21, 1944, not yet reported; *Country Garden Markets* v. *Bowles*, D. D. C., Jan. 24, 1944, not yet reported; *Waldera et al.* v. *Bowles*, D. N. D., Jan. 25, 1944; *Lineburger* v. *Manierre et al.*, S. D. Ia., Mar. 20, 1944; *Central West Oil Co.* v. *Bowles*, W. D. Mich., April 4, 1944, not yet reported; *La Porte et al.* v. *Bitker et al.*, E. D. Wis., April 4, 1944, not yet reported.

[15] Prior to reversal of the decision in *Wilemon* v. *Brown*, 51 F. Supp. 978 (N. D. Tex.), Judge Atwell had also decided *Jacobson* v. *Bowles*, 53 F. Supp. 532, which is now pending on appeal.

case which may be considered to the contrary, and that by way of a dictum or alternative holding.[16]

These decisions have construed the language of the Second War Powers Act in a manner benefitting its vital purposes. The duty of controlling shortages and preserving essential goods in wartime, through a system of allocation, marks this statute as one of the great remedial measures of recent years. Its contemporaneous construction by the agencies charged with its administration is, of course, entitled to great weight. *Adams* v. *United States,* 319 U. S. 312; *White* v. *Winchester Country Club,* 315 U. S. 32, 41; *United States* v. *American Trucking Associations,* 310 U. S. 534. As we shall show in a later connection, the Office of Production Management, and its successor, the War Production Board, from the outset construed the statute to authorize suspension orders, and specifically included the suspension order power in its delegation of authority to the Office of Price Administration by War Production Board Directive No. 1. Not only was the construction "contemporaneous," but the statutory provisions had been suggested by the Office of Production Management and in-

[16] *Sims* v. *Talbert,* 52 F. Supp. 688 (E. D. S. C.); *B. Simon Hardware Co.* v. *Nelson,* 52 F. Supp. 474 (D. D. C.), involving a War Production suspension order, is a decision of Mr. Justice Bailey which, in upholding the suspension order in the present case, he termed inapplicable. The decisions are being appealed.

troduced at that agency's request by Representative Vinson.[17] To construe the statute as excluding the power would very seriously impair its effectiveness. Were the question more doubtful than it is, such a construction would on that ground be avoided. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 392; *Armstrong Paint and Varnish Works* v. *Nu-Enamel Corp.,* 305 U. S. 315, 333.

In order to indicate more fully the integral place of suspension orders in the process of allocation, we turn to a consideration of the problem of allocation and the plan adopted to deal with the problem.

2. *The problem of equitable allocation in the wartime economy.*—Allocation is a process of choosing, limiting and withholding. The armed forces are constantly in need of critical commodities like petroleum. What is left for civilians is often less than a bare essential minimum. It is consequently necessary to allocate the limited supply wisely so as to assure an adequate flow of shortage materials to the armed forces, to our allies, and to the home front. In choosing among those clamoring for supplies, it may be essential to limit the availability of certain goods to persons with urgent claims because others must utilize the materials for still more pressing pur-

[17] Hearing on H. R. 4534 before Senate Committee on Military Affairs, 77th Cong., 1st. sess., May 14, 1941, p. 55.

poses. It is often imperative to withdraw or reclaim allocations granted, to reallocate, because of a changed military situation or a change in legitimate consumer demands. In making these vital allocations and reallocations, the War Production Board has played perhaps the most prominent role, exercising the allocation power through a wide variety of orders, in large measure to control basic industry. It has issued, among others, Materials Orders, Limitation and Conservation Orders, and Suspension Orders. The allocation power has also been exercised through delegation from the President or the War Production Board, or both, by the War Food Administration, the Petroleum Administration for War and the Office of Price Administration, all of which have issued suspension orders of the general type herein involved. Allocation by the Office of Price Administration is called rationing, that being simply another name for the same power.

The allocation and rationing of fuel oil is carried on jointly by the Petroleum Administration for War [18] and the Office of Price Administration, both imposing various restrictions and conditions in fulfilling their roles. The Office of Price Administration under War Production Board Directives 1 and 1-0, *supra*, p. 4, the latter dealing specifically with fuel oil, is

[18] The Petroleum Administration for War was established by Executive Order 9276 (7 Fed. Reg. 10091).

authorized to require any person who is involved in any stage of distribution of fuel oil to comply with its regulations. The Petroleum Administrator, under Executive Order 9276 (7 Fed. Reg. 10091), has the duty to conserve petroleum products, and, subject to the direction of the Chairman of the War Production Board, has the primary responsibility of maintaining an adequate supply throughout the distributing system. The Petroleum Administration for War is guided in providing for the physical flow of fuel oil into the rationed areas by the pattern of rationed demand as shown by the return flow of coupons. The Office of Price Administration exercises the rationing function, including complete control over the flow of coupons from consumer to dealer to supplier. It establishes the rules for guidance of dealers and suppliers in their role as distributing agents under the rationing system. Only through the maintenance of such control is it possible to enforce consumer rationing and equate the rationed demand with the supply as determined by the Petroleum Administration.

The importance of permitting every consumer to obtain his just share of the residual stock pile of critical materials like fuel oil is apparent. The public welfare requires an equitable system of allocation so as to avoid wasteful consumption by some while others are prevented from satisfying their basic needs. It was therefore incum-

bent on the Government to search for an equitable allocation plan which would enable it to effectuate the objects of the Act and comply with its standards by rationing materials in such manner, upon such conditions and to such extent as are necessary or appropriate in the public interest and to promote the national defense.

3. *The allocation plan adopted and the place of suspension orders therein.*—To achieve these statutory objectives the Government might have established initial tests requiring demonstration of complete responsibility, trustworthiness, comprehension of the ration rules, and proof of an organization adequate to operate within the ration system. This plan was scarcely feasible, considering the vastness of the project. The system would have amounted to a virtual designation of Government-approved outlets, the dealers becoming in a sense agents or designees of the Government in distribution of rationed goods. The Government instead has authorized use of all existing distribution channels, but has imposed a system of control to prevent waste, diversion, and injustice. The plan adopted permits all trustworthy persons to deal in rationed goods. It assumes, as an initial matter, that all persons are trustworthy and will carry out their duties in a zealous and diligent fashion. But the Government is aware of its duty to assure every consumer his just share of scarce and vital commodities.

Therefore the plan adopted permits dealers to act as distributing agents only so long as they continue to meet the conditions of eligibility set up in the initial allocation. This means that when the Government determines that a person does not meet the conditions of trustworthiness and responsibility essential for the protection of the public interest it may allocate away from the distributor, or in other words reallocate to others who are more likely to see that the flow to consumers is not diverted. A very pragmatic test of continuing eligibility has been adopted, and one least subject to abuse. The test is whether the dealer has been abiding by the rationing rules or has been violating them. Violation is indicative of the conduct that may be expected in the future in the absence of a reallocation or suspension order."

Viewed in another way, the requirement of compliance with ration rules is the "manner" or a "condition" of allocation. The power granted to impose conditions upon an allocation is not, of course, unlimited. The condition must be in the public interest and promote the national defense;

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[19] The Office of Price Administration has assigned to the Hearing Administrator and Hearing Commissioners this task of determining eligibility. These officers, divorced from the enforcement function, are a guarantee of impartial administrative treatment. No challenge in any respect has been made in this case to the fairness and fullness of the administrative procedure.

it must be germane; it must effectuate the allocation function. The elimination of untrustworthy persons as dealers in scarce commodities assuredly has such an effect. Likewise the restriction of petitioner, who flagrantly and continuously violated the rationing rules throughout the period of investigation, to its customers in the prerationing year, so that its desire for expansion at the expense of ration controls may be stemmed, is appropriate." The Office of Price Administration might well be considered derelict in its duty if it did not issue such protective orders."

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[20] Petitioner asserts (Br. p. 19) that if "the violations had been substantial, supportable by legal evidence and of a nature likely to recur", an injunction would have been the logical remedy. The assumption seems to be that these elements were not present. However, petitioner did not challenge the administrative decision as being unsupported in evidence. The Hearing Administrator found flagrant and substantial violations. He further found that the customers it served in the prerationing year approached the upper limit of its capacity to serve while complying with the ration rules (R. 49, 50). "Additional customers, then, clearly impose a burden which the respondent cannot bear" (R. 50).

[21] It becomes increasingly clear that there is no need to imply power to suspend, the suspension order in this case being an appropriate order under the allocation power. Petitioner's assertion (Petitioner's Brief, p. 30) that it is necessary for the Government to show that the allocation power includes power to buy and sell, or that fuel-oil dealers are licensees, is unwarranted.

As to the power to buy and sell, the petitioner concludes that the Government is urging that it possesses such power under the allocation authority. The Government takes no

4. *The remedial nature of the suspension order.*—We have seen that the allocation power includes the power to withdraw or suspend an allotment. This is supported in part by the consideration that a broad construction of the allocation power is appropriate, as petitioner itself concedes

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such position. It has suggested that completely regulated and approved Government outlets to eliminate initially untrustworthy dealers might have been used, if feasible, as an alternative to the present method of controlling eligibility. That does not mean that the Government would be forced to buy and sell, any more so than refusal to permit sale of tobacco, which has not been inspected and approved by Government representatives, in certain markets requires obtaining title. See Tobacco Inspection Act of 1935, 7 U. S. C. 511d. The language cited by petitioner as appearing on p. 29 of the Administrator's brief in the *Wilemon* case (Petitioner's Brief, p. 29) is not quoted in its context. On p. 28, the Administrator made it clear that the power to withdraw an allotment is included by its very nature in the power to allocate. However, stated the Administrator, *even if* the power had not been expressly given it can reasonably be implied. The Government is not required to show that fuel-oil dealers are licensees. Whether dealing in rationed commodities be termed a privilege or a conditional right, the petitioner is in any event subject to regulation. The important fact is that the terms of the suspension order are properly related to the carrying out of the allocation power. Some courts have noted that an allocation on condition is similar to a license or privilege in which rights do not vest. Thus the Court in *Perkins* v. *Brown*, *supra*, note 14, observed, 53 F. Supp. at p. 179:

> The suspension order is itself an allocation. Rationed commodities are allocated away from the violator for a period deemed reasonable under the circumstances, and at the same time the amount actually or potentially allocable to other and more trustworthy recipients of

(Brief, p. 31). The administrative construction of the statute and the legislative history, discussed *infra,* pp. 43–57, further show that the power to suspend is authorized. There is no need then to imply the power. The question is not whether the suspension order power should be *implied,* but whether the granted power to limit or withdraw allocations on condition should, *by implication, be limited* so as to exclude the exercise of such power when the condition is failure to observe the rationing regulation.

But petitioner has based its entire argument on the asserted need for resorting to an implied power. Petitioner argues that a rule of strict construction requires that penal power should not be read into the statute, though adopting the view urged by the Government in the courts be-

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rationed commodities has been increased. A distributor of gasoline may be likened to a licensee whose license runs during good behavior.

It is improper to say that the lower court cases can be characterized as upholding suspension orders on the licensing theory. Thus the Circuit Court of Appeals for the Fifth Circuit stated in the *Wilemon* case, *supra*, note 13, 136 F. (2d) at p. 732:

> We do not think a penalty has been ordained or adjudged in such a sense as to require the action of Congress and a court; but that observance of rationing rules may as a matter of administration be made "a condition" of participation in allocation, as mentioned in the Act * * *.

Finally, the Government does not propose to argue in this case the validity of suspension orders entered because of a price overcharge for a rationed commodity. The short answer is that such an order is not involved here.

low that the various possible legal significations of the term "penalty" have not been definitively settled. Petitioner thus desires that questions as to the existence of important wartime powers be determined on the basis of a term of characterization which has no certain meaning and which could have significance in this case, if at all, only if the issue were one as to implication of the authority to suspend. What is more, petitioner offers no formula indicating what it regards as those legal incidents which would characterize a provision as a penalty and would consequently prevent the implication of such a penalty power under strict rules of construction."[22] Nor does petitioner suggest that any such formulation of the term penalty would differ from the formula applied in other cases (see pp. 28–30, *infra*) where the characterization of regulation of a trade or profession as penal or remedial was important.

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[22] Petitioner suggests (Br. p. 23) that any "sanction" is penal by the very definition of the former term. But cf. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, where the question presented was one of construction of the statutory provision (29 U. S. C. § 160) authorizing the Board to award back pay and make other affirmative orders. In approving of an award of back pay and a requirement that the company return certain dues collected by its union, the Court stated (p. 477): "The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees." Petitioner suggests no formulation of what is a sanction, other than that it is penal.

We think that the question in the present case cannot profitably be approached by introducing the concept of "penalty" as a test and then endeavoring to define the concept. Since, however, most of petitioner's argument proceeds on this course, we shall briefly consider the authorities and their relevance in the light of the actual administration of the allocation authority through suspension orders.

That a statute is burdensome or has "drastic consequences" (see Pet. Brief, p. 23) will not prevent the Court from construing it liberally when that is deemed in the public interest. *Baltimore & Philadelphia Steamboat Co.* v. *Norton,* 284 U. S. 408; *Alpha S. S. Corp.* v. *Cain,* 281 U. S. 642. Even a statute imposing a civil penalty will be liberally construed to carry out its intent. Thus legislation imposing a fine of $1.00 a head for pasturing "cattle" on Indian land was held to forbid the pasturing of sheep as well, since such a construction would most fully promote the policy and objects of the Legislature. *Ash Sheep Co.* v. *United States,* 252 U. S. 159. The subordinate role played by the remedial-penal concept becomes apparent.

Both in the court below and here petitioner has relied on *Cummings* v. *Missouri,* 4 Wall. 277, and *Ex parte Garland,* 4 Wall. 333, cases involving statutes imposing qualifications for office which were held to be additional punishment violative

of the constitutional prohibition against *ex post facto* laws. *Hawker* v. *New York*, 170 U. S. 189, established that a statute which forbade persons convicted of a felony from practicing medicine did not increase the punishment for an offense already committed. The Court held that the statute merely prescribed a qualification for practice of the profession for the protection of the public.[23] The Court rejected the applicability of *Ex parte Garland*, 4 Wall. 333, and *Cummings* v. *Missouri*, 4 Wall. 277, relied on by petitioner (Brief, pp. 21, 22), noting that those cases held unlawful test oaths as to past conduct respecting matters which had no connection with the profession of an attorney or a minister from which the parties in the respective cases would be barred.

It is to be noted that the Court in the *Hawker* case decided that the restriction on the practice of medicine was protective. If it had deemed it to be punishment, civil or criminal, its holding would have been otherwise. The Court did not hold that the statute imposed a retroactive *civil* punishment, which was not violative of Constitu-

[23] The Court stated, at p. 196:

> That the form in which the legislation is cast suggests the idea of the imposition of an additional punishment for past offenses is not conclusive. We must look at the substance and not the form, and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the State should be deemed of such bad character as to be unfit to practice medicine * * *.

tional prohibitions. Such a holding would seem unwarranted. Rather the Court flatly held no punishment was contemplated. This test of inflicting a loss for the purpose of punishing an offense, as opposed to establishing reasonable qualifications or restrictions for proper fulfillment of a responsible wartime distribution service, we submit, is the legitimate distinction for any relevant purpose between penal and remedial action in the instant case.[24]

Wright v. *Securities and Exchange Commission,* 112 F. (2d) 89 (C. C. A. 2d), involved the provision of the Securities and Exchange Act[25] authorizing the Commission, if in its opinion such action is necessary or appropriate for the protection of investors, to suspend or expel any member of an exchange who had violated any provision of the Act. The issue was one of degree of proof; the court did not place its decision on the ground that suspension was merely a civil penalty. Rather the court stated (at p. 94):

> In considering the order of expulsion as a punishment for past offenses the petitioner is in error. Section 19 (a) (3),

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[24] *Champlin Ref. Co.* v. *Corporation Commission,* 286 U. S. 210, cited by Petitioner (Brief, pp. 23, 24), is factually unlike the instant case. The decision can be said to turn not on the "drastic consequences" of receivership but on the court's determination that receivership was imposed for the purpose of punishment.

[25] 15 U. S. C. 78s (a) (3).

> 15 U. S. C. A. § 78s(a) (3), authorizes an order of expulsion not as a penalty but as a means of protecting investors, if in the Commission's opinion such action is necessary or appropriate to that end. Since the purpose of the order is remedial, not penal, there is no basis for the contention that Wright's violation of the statute must be proved beyond a reasonable doubt.

Nichols & Company v. *Secretary of Agriculture,* 131 F. (2d) 651, (C. C. A. 1st), involved a 90-day suspension of a commission merchant under the Commodity Exchange Act for a past violation of the statute. The issue was one of construction of the law. In this connection the court stated, at p. 659:

> We believe that suspension of a registrant is not primarily punishment for a past offense but is a necessary power granted to the Secretary of Agriculture to assure a proper adherence to the provisions of the Act.

See also *Nelson* v. *Secretary of Agriculture,* 133 F. (2d) 453, 456–7 (C. C. A. 7th).

Wallace v. *Cutten,* 298 U. S. 229 (Pet. Br., p. 24), is in no way opposed to the position urged here. That case involved proceedings brought under Section 6 (b) of the Grain Futures Act by the Secretary of Agriculture to suspend a member of the Chicago Board of Trade. The

Secretary was empowered to institute such proceedings if he had reason to believe any person "is violating" any provision of the Act or regulations issued thereunder. Proceedings were commenced in 1934 before a commission named in the Act against Cutten to determine whether his trading privileges should be suspended for acts committed in 1930 and 1931. Cutten's motion to quash, on the ground that Section 6 (b) empowered the commission to act only against persons presently committing offenses, was denied by the Board but sustained on appeal by the Circuit Court of Appeals. This Court affirmed, on May 18, 1936, holding that the language used permitted suspension only for present violations. On June 15, 1936, one month later, the Grain Futures Act was amended. Its short title was changed to the "Commodity Exchange Act." Section 6 (b)[*] was altered to permit suspension of a person who "is violating" or "has violated" the Act or regulations. The Section, as amended, was construed in *Nichols & Company* v. *Secretary of Agriculture, supra,* and *Nelson* v. *Secretary of Agriculture, supra,* as providing for a suspension order that was remedial and not punitive. These cases involved past offenses. *Wallace* v. *Cutten* therefore simply stands for the proposition that the language used necessitated present violations to

[*] 7 U. S. C. 9.

justify suspension. The court had no occasion to determine whether suspension for past violations was a "penalty." The courts in the *Nichols* and *Nelson* cases have resolved that issue by rejecting the penalty argument.

The important consideration in this case is whether the instant order was imposed for the purpose of punishment or as a safeguard to the rationing system. A blanket review of Procedural Regulation No. 4, as attempted by petitioner in its brief, is not helpful. The considertions suggested by petitioner (Brief, p. 17) show that every procedural safeguard of its rights was employed and not that a punishment was inflicted. Any order under Procedural Regulation No. 4 which is not germane to the allocation function and which is not in the public interest would be invalid.

It should be emphasized that the actual administration of the present suspension authority demonstrates that it is used in a remedial fashion to effectuate the allocation program, and not as a penalty for punishment of transgressors. Thus the Hearing Commissioners and the Hearing Administrator consider the effect the suspension order will have upon the community at large, and if they determine that the net result of respondent's suspension will be harmful to the locality, they decline to allocate away from the violator,

because such an allocation would not be appropriate in the public interest."

In *Matter of Petrol Corporation,* Docket No. 2–58A, October 14, 1943, the Hearing Administrator reviewed the theory governing the practical administration of the suspension power. His language is significant:

> * * * The power to allocate involves either a withholding or a grant. They are different sides of the same shield. The term allocation involves the idea of conscious choice—otherwise it is not allocation being exercised but rather an automatic grant to all. We cannot conceive that a nation in the extreme emergency of war is powerless to conserve and safeguard its slender stock of critical materials. We cannot conceive that our nation, so threatened, may not, in its distribution of such scarce commodities, choose between the worthy and the unworthy, between the trustworthy and the wasteful, allocating to each in proportion to his ability to guard, conserve, and wisely distribute. For most

[11] *Matter of Tramore Cafeteria, Inc.*, Docket No. 4–18A, July 27, 1943; *Matter of James C. Sylvia & John B. Morse*, Docket Nos. R1–S806, R1–S807, Hearing Commissioner, Region I, October 20, 1943; *Matter of Dr. M. A. Kugel*, Docket No. 4–479, Chief Hearing Commissioner, Region IV, October 5, 1943; *Matter of M. V. Wallace, d/b/a Midway Grocery & Everfresh Market*, Docket No. 8410–21473, September 20, 1943; *Matter of L. H. Godwin, d/b/a Godwin's*, Docket No. 4–682, Chief Hearing Commissioner, Region IV, November 4, 1943.

there will be no restrictions beyond those imposed by the general ration order itself. Indeed the plan of rationing adopted by this country presupposes equal trustworthiness in all and permits equal participation, initially, in handling of scarce commodities. It is only after demonstrated unworthiness or inability that the burden is lessened to that which may safely be borne. In some extreme cases of wanton indifference or malevolent design it may be (and has been) determined that for the duration of the war such individuals should not again be trusted with scarce commodities. For others, those who have been careless, or to some extent indifferent or callous, a period of suspension of the privilege of handling the critically scarce commodity will serve the purpose of enabling the distributor to put his house in order, to set up a system of controls, to indoctrinate inefficient or careless help, and to make himself ready in all respects for a continued assumption of his duty of careful distribution. Such was the action taken by us in this case.

Suspension orders are not effective beyond the period during which the commodity involved is rationed. When coffee was withdrawn from the ration list, outstanding suspension orders were immediately lifted.[28] This was a clear recogni-

[28] See *Matter of Tramore Cafeteria, Inc.*, Docket No. 4–18A, Hearing Administrator, October 6, 1943. Although there had been violations of Ration Order No. 12, covering coffee,

tion that these orders are remedial in character and not a penalty imposed as punishment. Neither the revocation of fuel-oil rationing nor the repeal or expiration of the Second War Powers Act will cause remission of fines or termination of jail sentences imposed by the courts under Section 2 (a) (5) of the Act. These fines and prison sentences are penalties, and therefore have different legal incidents from those of allocation orders.

The suspension power is to be regarded as implementing the allocation process even though frequently the order issued is for a short period of time rather than for the duration of rationing. As noted in the *Petrol* proceedings, *supra*, persons who have not shown themselves completely irresponsible may take steps during the period of suspension to acquaint themselves and their employees with their duties under the Ration Order. Furthermore, the Hearing Commissioners and the Hearing Administrator take into consideration the harm to the individual of a long-term suspension, and, if the respondent is found

as well as of Ration Orders 3, 5, and 13, the Hearing Administrator stated he excluded coffee from the suspension order because, pending appeal, the commodity ceased to be rationed. On August 3, 1943, the Assistant General Counsel, in Charge of the Food Enforcement Branch, instructed all Office of Price Administration Regional Enforcement Attorneys to advise persons suspended for violations of coffee rationing that their suspensions were automatically terminated by the lifting of rationing.

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to be not entirely unsatisfactory as a distributing agent, the Office of Price Administration will take into account the probable improvement in compliance habits that may be expected from suspension for a short term.[29] The withdrawal of the authority to deal in the rationed commodity may therefore be for a limited period, with the thought that respondent will subsequently resume its distributing function as a diligent and responsible distributor.

The Administrator does not wish in any way to discount the important enforcement and compliance benefits stemming from suspension orders. These orders have deterrent effects not only upon the parties suspended but upon the entire trade (R. 69, 70). However, many other conditions imposed under the allocation power have like deterrent effects. Thus periodic tire inspection, including inspection of the serial number on the tire, as a condition for receiving gasoline rations, served the important function of preventing black market sale of new and recapped tires. So long as punishment is not the object, deterrent results stemming from the agency practice indicate its desirability.

The petitioner cannot rightfully challenge the remedial purpose of the suspension order issued

[29] See, e. g., *Matter of George Canaris and Mrs. Alba Acosta*, Docket No. 8230-2532, Hearing Commissioner, Region VIII, Aug. 21, 1943, where suspension was limited on the belief that the order would be enough to bring home the necessity for compliance.

by the Hearing Administrator in the instant case. Mr. Justice Bailey in the District Court ruled that the order was not imposed as a penalty or punishment for past conduct but for the protection of the public in the future. (R. 61),[39] The Court of Appeals expressed a like view (R. 69, 70). The petitioner has not challenged the suspension order as being unsupported by substantial evidence. A challenge now by the petitioner to the administrative order as being an unreasonable way to protect the public can hardly be made in the absence of an allegation in the complaint of lack of substantial evidence in the administrative record to support the kind of order entered. That record might well show that an unconditional suspension of petitioner as a fuel oil dealer for the duration of fuel oil rationing would also have been justified.

In paragraph nine of its Complaint (R. 10, 11) the petitioner alleged that it would suffer irreparable injury because of its restriction to sales to customers served by it between October 21, 1941, and October 21, 1942. It alleged that its records do not show the sales to cash customers. It further alleged a turn-over in customers each year, making it likely that some of its accounts of the prerationing period will have been obtained by others. It now seeks to use these allegations

[39] Mr. Justice Bailey held inapplicable his own ruling in *B. Simon Hardware* v. *Nelson*, 52 F. Supp. 474 (D. D. C.), a case involving a War Production Board suspension order.

to support a claim that the order goes beyond a remedial purpose and is therefore a penalty. (Brief, p. 20.) It did not, however, introduce the administrative record in the injunction proceedings or allege that the administrative transcript would show that petitioner has no record of its cash customers, or, at the very least, that it would not affirmatively show that such records exist. Actually the administrative record fully supports the kind of an order entered, since it showed that petitioner had a separate card in its files for each customer served, indicating whether the delivery man should leave fuel oil with the named consumer only upon payment of cash, showing the date and amount of each sale, and containing a secret code credit rating. Such information supports the Hearing Administrator's determination that the kind of order entered would return petitioner to approximately the kind of business it could responsibly handle. Furthermore, even assuming that petitioner did not have records of these customers, that would not mean that it could not discover who they were.[31]

[31] The petitioner could obtain the names of its customers during the prerationing heating season from the files of the local Ration Boards. A consumer applying for fuel oil at the start of rationing was required to state the amount of fuel oil obtained from each dealer with whom it dealt during the previous heating season and obtain each dealer's certification, or explain why that was not possible. See section 1394.5253 of Ration Order No. 11. The information revealed by these files could be followed up, if necessary, by communicating with the customer.

The rate of turn-over of customers of petitioner once its operations are restricted cannot at this time be known. Such turn-over means that old customers will return as well as depart. The treatment afforded customers is material as to the turn-over that may be expected. Petitioner, under the restrictive order, may bend its efforts to properly serving those customers who in the public interest are entitled to receive fuel oil from it.[32] Such efficient service by petitioner was not possible during the period when it was attempting wholesale expansion beyond its capacity at the expense of its competitors and the public by flouting the rationing rules. (See R. 43.) In the event that petitioner's turn-over proves excessive in spite of efficient efforts to retain its prerationing customers petitioner can always seek administrative modification of the order.

It is understandable that a suspension order will cause injury to petitioner. It has not, however, merited a less restricted role in the rationing program. The Hearing Administrator found numerous and flagrant violations which endanger the rationing program. Petitioner's failure to turn ration coupons in to its supplier, for example, was destructive of the controls instituted

[32] The general plan of distribution of fuel oil under rationing and wartime quota restrictions is along historical lines, with suppliers giving nondiscriminatory preference to their prerationing customers and dealers treating consumers in the same fashion.

by the Office of Price Administration to provide for the orderly flow of fuel oil to all parts of the country. Petitioner's supplier, Petrol Corporation, no more cooperative than petitioner itself, receiving no coupons, turned none in to the Control & Audit Section of the Rationing Branch of the Office of Price Administration. Petrol was suspended, the Hearing Administrator remarking:

> The successful operation of the rationing plan or system adopted is dependent upon the timely and uninterrupted "flow-back of ration evidence". This means that coupons or other evidences must accompany the transfer of fuel oil at each successive level from the consumer, through the dealer, to the primary supplier, who, in turn, must account monthly for his receipts and transfers of fuel oil within the limitation area during the preceding month (except transfers to other primary suppliers) to the Control & Audit Section of the Fuel Oil Rationing Branch, in Washington, submitting exchange certificates or a ration check to cover the transfers. Rationing to consumers cannot be enforced or controlled unless coupons or other evidences flow upstream to ultimately balance with the total amount of fuel oil transferred.

The harm to the public and the rationing system was the basis for administrative action

against petitioner. That the harm to petitioner might have been less if a different order had been entered is immaterial so long as the order issued is appropriate.

In fact it cannot be said that the suspension order is in any way unreasonable. The restriction of petitioner to customers serviced by it during the prerationing year (October 21, 1941, to October 21, 1942) approximates, as nearly as administratively feasible, the *kind* of business the petitioner was organized to manage before its expansion achieved through flouting ration rules. The kind of business petitioner had is not determined by the *amount* of fuel oil sold, as an isolated factor. Account must be taken of geographical distribution of customers, the number of consumers for whom petitioner must keep records and to whom it must make deliveries, the size of the sale to each customer, and total volume of sales. The suspension order itself must not put the onus of difficult enforcement upon public agencies; the petitioner has been the violator, not the public. There must be a simple check available to see that petitioner is complying.

The suspension order proceedings were based upon the conduct of petitioner during the 1942–1943 heating season. Petitioner notes (Brief, p. 19) that no violations in the present heating season have been claimed to exist at any stage of

the proceedings. These administrative proceedings, it should be remembered, commenced in August 1943, before the present heating season, by a formal statement of charges (R. 23–31) which petitioner had every right to believe would constitute the exclusive subject matter of the later proceedings. A contrary procedure would not have accorded due process. There is no basis for implying that further violations have not occurred, or are not likely to occur. On the contrary, the past record of petitioner indicates that it would have continued to violate in the absence of a suspension order. Nor does petitioner have any basis for implying that the Office of Price Administration delayed bringing proceedings once it had completed its investigation. The process of discovering violations is time-consuming and expensive. That is one reason why violating dealers must be suspended or restricted to the kind of business that they have the capacity to handle.

Nor can it be said that the suspension order is punishment because persons possibly untrustworthy, as gleaned from their conviction for some criminal offense, or their violation of some wartime restriction, are permitted to participate in the allocation system until they violate ration rules. The administrative desirability and feasibility of considering these factors for tests of

eligibility are questionable.[33] The standard for eligibility selected is a reasonable one, although some other system might possibly have been adopted.

B. *Congress knew that suspension orders were being issued as part of the allocation function, did nothing to alter the practice, and in fact affirmatively approved it*

1. By reenacting Section 2 (a) of the Priorities and Allocations Act, after that Section had been construed to authorize suspension orders, Congress ratified and confirmed the known administrative construction and practice

The analysis presented thus far has shown that the power to issue suspension orders is a necessary phase or attribute of the statutory power to allocate. Any doubt on this score was removed by the congressional reenactment of Section 2 (a) of the Priorities and Allocations Act after that Section had been construed to authorize the issuance of suspension orders.

The Priorities and Allocations Act became effective May 31, 1941. Ten months later Congress

[33] Petitioner itself attacks a further test of eligibility adopted by the Office of Price Administration and one much more closely related to the allocation process than any of the tests petitioner suggests, that of whether or not the dealer is exceeding the maximum ceiling price for the rationed commodity (Brief, pp. 35, 36).

passed the Second War Powers Act (March 27, 1942), Title III of which reenacted the language of Section 2 (a) of the earlier Act. Section 2 (a) (2) reads:

> * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material *or of any facilities* for defense or for private account or for export, the President may allocate such material *or facilities* in such manner, *upon such conditions* and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense. [Italics supplied.]

The only changes made in this section were the additions of the italicized words. "Facilities" were now included as well as "material," and the phrase "upon such conditions" was appended. Civil and criminal penalties were added by Section 2 (a) (5) and (6). Between the pertinent dates of May 31, 1941, and March 27, 1942, the Office of Production Management and its successor, the War Production Board, had issued thirteen suspension orders.[34] This exercise of the suspension order power by the Office of Production Management and the War Production Board was well known to the Congress which re-

[34] These orders were issued as follows: S–1, on October 15, 1941, 6 F. R. 5293; S–2, December 20, 1941, 6 F. R. 6647; S–3, December 22, 1941, 6 F. R. 6685; S–4, December 22, 1941, 6

enacted Section 2 (a) of the Priorities Act in Title III of the Second War Powers Act." In the Senate Hearings on the Second War Powers Act, Oscar Cox, General Counsel for the Office for Emergency Management, who was presenting the bill to the Committee on the Judiciary, brought the suspension order procedure expressly to the attention of the Committee:[35]

> The only penalty provided under the Vinson Act, the June 28, 1940, Act, is to cut off a man's supply or to requisition what he has under the Requisitioning Act.

It will be observed that Mr. Cox employed the word "penalty" in a loose sense, in recognition of the enforcement effects of the suspension order. Such loose references appear throughout the legislative history. If these references mean any-

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F. R. 6685; S–5, December 22, 1941, 6 F. R. 6686; S–6, December 22, 1941, 6 F. R. 6686; S–7, December 20, 1941, 6 F. R. 6648; S–8, February 10, 1942, 7 F. R. 945; S–9, February 10, 1942, 7 F. R. 946; S–10, February 3, 1942, 7 F. R. 750; S–11, February 6, 1942, 7 F. R. 902; S–12, February 10, 1942, 7 F. R. 946; S–13, March 21, 1942, 7 F. R. 2236.

[34] As early as August 14, 1941, David Ginsburg, General Counsel of the Office of Price Administration, in testifying on the Emergency Price Control Bill, replied to a question concerning the sanctions for priority enforcement by pointing out that "Mr. Stettinius * * * can cut off that man from further materials." H. Hearings, Committee on Banking and Currency, on H. R. 5479, 77th Cong., 1st Sess., p. 589.

[35] Statements in Executive Session on S. 2208, 77th Cong., 2d Sess., Jan. 19, 1942, p. 20.

thing it is that Congress, by reenactment of the statute with full knowledge of the penal effect of suspension orders, nonetheless approved and ratified the administrative practice of issuing them. Congress was, of course, free to approve the administrative practice, irrespective of its penal or remedial nature, and has done so. "Penalty," being a word of uncertain meaning, has not been held necessarily to carry with it legal consequences, even though used by Congress itself. Thus the double damages section of the Fair Labor Standards Act [37] was held by this Court in *Overnight Motor Transportation Co.* v. *Missel,* 316 U. S. 572, 583, to be "not a penalty or punishment," although Congress has headed the section: "Penalties; civil and criminal liability." Cf. *Divine* v. *Levy,* 45 F. Supp. 49 (W. D. La.).

The Senate Committee Report likewise recognized the existence of the administrative suspension order sanction by stating: [38]

> The Attorney General presented to the committee the need for adequate machinery to enforce the priorities law. He reported that violations of priorities and allocations orders are widespread. He pointed out that there is a real need for penal provisions and the power to enjoin violations of priorities orders. Administrative sanctions, although highly impor-

[37] 29 U. S. C. 216 (b).

[38] Senate Rep. 989, 77th Cong., 2d sess.

tant, do not provide a proper penalty in every case.

The House of Representatives also had notice of the suspension order procedure. The Attorney General made the following statement (H. Hearings before Committee on the Judiciary, 77th Cong., 2d sess., on S. 2208, January 30, 1942, pp. 10–11):

> It is true that there are various administrative sanctions available to the Office of Production Management. Fuel and power might be cut off to a factory violating the priorities order as was done during the World War on several occasions. But administrative sanctions, although highly important, do not provide an adequate remedy in all cases. For example, at a time when airplane production is vitally needed it would not facilitate war production to curtail the supply of aluminum to an airplane company and thus close the plant.
>
> The civil and criminal remedies provided are intended to supply the means whereby priorities orders and allocations can be enforced *when administrative sanctions are not appropriate.* [Italics supplied.]

Congressman McLaughlin, from the Committee on the Judiciary, the sponsor of the bill, in presenting Title III to the House of Representatives, said:[39]

[39] 88 Cong. Rec., Feb. 24, 1942, p. 1586.

> * * * Under the present law various administrative provisions affecting priorities are available to the Office of Production Management. These are in the way of sanctions, such as cutting off power, and the withdrawing from a factory of materials, such as aluminum.

It is clear from the legislative history above quoted that the criminal and civil penalties added by Section 2 (a) (5) and (6) were not contemplated as substitutes for the suspension order but as supplementary compliance measures. The sponsors of the bill came before the Congress to obtain these civil and criminal sanctions because, as was pointed out to Congress, the suspension order oftentimes cannot suitably be employed.[*]

The congressional reenactment of the statutory provision, with knowledge of its construction by the executive authority responsible for its administration and enforcement, constitutes a legislative ratification and adoption of the administration construction. *Nagle* v. *Loi Hoa,* 275 U. S. 475; *Copper Queen Consolidated Mining Co.* v. *Territorial Board of Equalization,* 206 U. S. 474; *United States* v. *Cerecedo Hermanos y Compania,*

[*] The original draft of the Second War Powers Act was prepared by the Department of Justice. See Statement of Attorney General Biddle, H. Hearings before Committee on the Judiciary, 77th Cong., 2d sess., on S. 2208, Jan. 30, 1942, p. 8. Title III was proposed to the Department of Justice by Donald Nelson, Chairman of the War Production Board, *Ibid.*, p. 10.

209 U. S. 337; *Komada and Co.* v. *United States*, 215 U. S. 392; *Massachusetts Mutual Life Insurance Co.* v. *United States*, 288 U. S. 269; *Brewster* v. *Gage*, 280 U. S. 327; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488; *Burnet v. Brooks*, 288 U. S. 378; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459; *Old Mission Co.* v. *Helvering*, 293 U. S. 289; *Hartley* v. *Com'r of Internal Revenue*, 295 U. S. 216; *Hassett* v. *Welch*, 303 U. S. 303."[41]

While an automatic or mechanical application of the reenactment rule may be thought to be unrealistic where there is no showing that Congress had knowledge of the administrative interpretation which it is held to have ratified by reenactment, this criticism is in no way applicable to the present situation. As shown by the legislative sources referred to above, and as is evident from the great public significance of the

[41] The reenactment rule may be applied where there has been but a single reenactment. Thus in *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, where the Court refused to apply the reenactment principle to an interpretation which had been abandoned prior to enactment of the later Act, the Court, in the course of its opinion stated (p. 99), with reference to an administrative interpretation which had *not* been abandoned prior to reenactment, that "it may be assumed that that administrative construction received legislative approval by the reenactment of the statutory provision in the 1924 Act, without material change. Cf. *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466."

administrative action concerned, Congress knew of the administrative construction of Section 2 (a) at the time it reenacted the language of that Section in the Second War Powers Act. Indeed, the basic rationing directive, War Production Board Directive No. 1, issued January 24, 1942, two months prior to the passage of the Second War Powers Act, spelled out the administrative construction (see p. 4, note 3, *supra*). Congress could not have been unaware of the terms of this widely publicized and discussed delegation of rationing authority. The case presented is thus one of the strongest possible cases for application of the reenactment principle, and the arguments advanced in opposition to application of that principle where in fact the administrative construction was obscure and unimportant, are wholly irrelevant.

It follows therefore that the reenactment of Section 2 (a) of the Priorities Act, after the administrative authorities had construed the section as authorizing the issuance of suspension orders, constitutes, in the first place, a controlling legislative approval of the well-known administrative construction and practice, and indicates that Congress regarded the authority as comprehended within the original statutory grant of power. In the second place, it shows a ratification of the known administrative practice, even

assuming *arguendo* that there had been no prior expressed or implied legislative grant of authority. *Hirabayashi* v. *United States*, 320 U. S. 81; *Brooks* v. *Dewar*, 313 U. S. 354; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 300–303; *Silas Mason Co.* v. *Tax Commmission*, 302 U. S. 186, 208; *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 146–148; *Tiaco* v. *Forbes*, 228 U. S. 549, 556; *United States* v. *Heinszen & Company*, 206 U. S. 370, 382, 384; *Wells* v. *Nickles*, 104 U. S. 444, 447; *Prize Cases*, 2 Black 635, 671.

2. The legislative history of the Federal Reports Act of 1942 demonstrates that the Congress recognized the suspension-order practice

On December 24, 1942, the Federal Reports Act of 1942 [a] entitled, "an Act to coordinate Federal reporting services, to eliminate duplication and reduce the cost of such services, and to minimize the burdens of furnishing information to Federal agencies," was approved. Prior to and at the time of the consideration of this legislation, Congress had been fully advised of the use by the Office of Price Administration of the suspension order procedure. Actively participating in the debates on the bill which became the Federal Reports Act was Representative Howard W. Smith, Chairman of the Select Committee to Investigate Executive Agencies.

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[a] 56 Stat. 1078, 5 U. S. C. (Supp. II) 139 et seq.

The discussion on the floor of the House of Representatives relating to the provisions of the bill which dealt with the furnishing of information by persons to government agencies demonstrates that Congress not only approved but specifically authorized the use of the suspension order power by the Office of Price Administration to withdraw from any person the use of any material with respect to which a particular type of information was sought and refused. The legislative history unmistakably indicates that a limited provision, proposed by Representative Smith, was intended to forbid the use of suspension orders only against persons refusing requested information which would not reveal the facts upon which receipt of a rationed commodity was legally conditioned. Mr. Smith presented his amendment from the floor.[48]

> Mr. SMITH of Virginia. Mr. Speaker, I offer an amendment which I send to the Clerk's desk.

The Clerk read as follows:

> Amendment offered by Mr. Smith of Virginia: After line 11, page 7, insert a new section 8 as follows:
>
> "Any person failing to furnish information required by any such agency shall be subject to such penalties as are specifically prescribed by law and no other

[48] 88 Cong. Rec., Nov. 27, 1942, p. 9164.

> penalty shall be imposed, either by way of fine, or imprisonment, or by the withdrawal or denial of any right, privilege, priority, allotment, or immunity, afforded to any other person."

Thereafter the bill as so amended went to conference and the conferees added to the Smith Amendment the following pertinent language.[44]

> except when the right, privilege, priority, allotment, or immunity, is legally conditioned on facts which would be revealed by the information requested.

When the bill came back to the House for consideration the following discussion occurred (*ibid.*):

> Mr. SMITH of Virginia. I would like to inquire of the gentleman from Mississippi as to the amendment placed by the conference committee to the amendment which I offered and which was adopted by the House. That amendment, which was adopted by the House, provided that no extra legal penalties should be imposed upon any citizen for failure to answer any of these questionnaires. The Senate has added some rather complicated language to that amendment. I would like to be sure, and I think the House would like to be sure that this language does not affect or destroy the fundamental purpose of the House amendment. * * *

[44] 88 Cong. Rec., Dec. 10, 1942, p. 9435.

Mr. WHITTINGTON. I may say in answer to the question propounded by the gentleman from Virginia that the conference report contains substantially the amendment that he proposed in the House and that was adopted by the House. The report of the managers on the part of the House shows it was the purpose to retain the substantial provisions of that amendment to prohibit the very things the gentleman's amendment undertook to condemn. There is clarifying language only in the conference report, and it was believed that the clarifying language was necessary in order to make effective the purpose the House and the gentleman had in mind in adopting the amendment proposed by him.

To answer specifically: The language of his amendment, it was thought by the conferees, might encourage the citizen who was obstinate and refused in any way or in any degree to cooperate; for instance, in the rationing of sugar if the citizen in applying for his allotment were to refuse to answer, and the chiseler were to refuse to disclose, that he had sugar on hand, there would be no way to deny him his allotment of sugar. The purpose of the amendment was to reach such an illustrative case as I have just mentioned.

Mr. SMITH of Virginia. That was the only purpose of the amendment.

Mr. WHITTINGTON. That was the purpose of the amendment.

Mr. SMITH of Virginia. Let us suppose a person applies for a sugar card and refused to answer the questions upon which he is entitled to the issuance of that card, then under that amendment the O. P. A. *can quite properly say he can have no sugar.*

Mr. WHITTINGTON. *Otherwise we would absolutely hamstring the Price Administration.*

Mr. SMITH of Virginia. *I am in thorough accord with that;* but most certainly it should not give the Administration the power to deny a man sugar because he does not answer some question on an application for gasoline. For instance, I had this example brought to my attention: A transportation company was asked voluntarily to agree to something that this particular agency could not require them to do and which would very seriously have handicapped that transportation company. They said: "No; we will not voluntarily agree to do that."

The answer was: "Well, if you do not voluntarily agree to that we will see that you do not get any tires for your automobiles."

That is the kind of thing I think this Congress does not want to condone being done by the executive department. [Italics supplied.]

Congressman Hinshaw then remarked that he had inquired of the Office of Price Administra-

tion as to "what authority of law there might be by which the Administrator of the Office of Price Administration could say that he could refuse to issue gasoline rationing tickets to anybody who owned more than five tires." The Congressman inserted in the Record a copy of Administrator Henderson's reply which first referred to the basic authority granted in Section 2 (a) (2) of the Priorities and Allocations Act, as embodied in Title III of the Second War Powers Act, and then went on to say:

> In order to insure that adequate supplies of tires be made available at the appropriate time and in the appropriate manner for uses to carry on the war effort, it is imperative that the Government secure possession and control over all tires in excess of five, which are normally needed to operate a car. Only the Government is in a position to effect an effective and equitable allocation of such tires. It seems clear, therefore, that the acquisition of such tires and their distribution are part of the allocation program authorized by the Priorities and Allocations Act. Conditioning gasoline rationing upon the turning over of excess tires to the Government is appropriate for this purpose, because the objective of both gasoline rationing and tire rationing is the proper allocation of transportation facilities.

Section 8 of the Federal Reports Act,[45] as finally passed, reads:

> Any person failing to furnish information required by any such agency shall be subject to such penalties as are specifically prescribed by law, and no other penalty shall be imposed either by way of fine or imprisonment or by the withdrawal or denial of any right, privilege, priority, allotment, or immunity, except when the right, privilege, priority, allotment, or immunity, is legally conditioned on facts which would be revealed by the information requested.

This legislative history makes it clear that Congress possessed full information as to what suspension orders were, and how, and by what authority, they were being used.[46] In the light of this knowledge, Congress specifically legislated on the subject of suspension orders in Section 8 of the Federal Reports Act. This section forbade the use of such orders in a special type of situation, and by express exception recognized the

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[45] 5 U. S. C. (Supp. II), Sec. 139f.

[46] On November 15, 1943, Congressman Smith's Select Committee issued its Second Intermediate Report (H. Rep. No. 862, 78th Cong., 1st sess.). This Report condemned suspension orders as unauthorized "penalties," labeled the contentions of John Lord O'Brian, General Counsel of the War Production Board, set forth in a letter to the Chairman, as "ridiculous," and relied on the decision of the lower court in the *Wilemon* case, later reversed, *supra*, p. 16, note 13.

authority for their use in other cases. This has a twofold significance: (1) It shows that Congress knew how to find words to accomplish its purpose in a situation where it desired to forbid suspension orders. This in itself is the clearest congressional recognition that the power exists where its exercise is not prohibited. (2) It shows that Congress accepted and approved the use of suspension orders except in the special area of the prohibition.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

THOMAS I. EMERSON,
Deputy Administrator,
FLEMING JAMES, JR.,
Director, Litigation Division,
DAVID LONDON,
HARRY SHNIDERMAN,
Office of Price Administration.

APRIL 1944.

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SUPREME COURT OF THE UNITED STATES.

No. 793.—October Term, 1943.

L. P. Steuart & Bro., Inc., Petitioner, vs. Chester Bowles, Administrator, Office of Price Administration, et al. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[May 22, 1944.]

Mr. Justice Douglas delivered the opinion of the Court.

Sec. 2(a)(2) of Title III of the Second War Powers Act (56 Stat. 178, 50 U. S. C. App. (Supp. III), § 633) provides in part:

> "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

By § 2(a)(8) of the Act the President is granted authority to exercise that power "through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe". That authority, so far as material here, was delegated to the Office of Price Administration,[1] which promulgated Ration Order No. 11, effective October 22, 1942, providing for the rationing of fuel oil.[2] That order recited the now familiar facts concerning the then critical and acute shortage of fuel oil and other petroleum products in the eastern states due to the great war activity. It stated that it was "essential to guarantee the continued availability of adequate supplies of fuel oil for military and naval use and for industrial and agricultural operations" and that the "reduction of demand to the available supply is sought to be achieved largely by a curtailment of the use of fuel oil for heating premises and for hot water, virtually the only classes of uses which can be uniformly reduced

[1] Executive Order No. 9125, 7 Fed. Reg. 2719; War Production Board, Supplementary Directive 1-0, Oct. 16, 1942, 7 Fed. Reg. 8418.

[2] 7 Fed. Reg. 8480.

without directly impeding the war effort."[3] The order inaugurated "a system of rationing control" deemed necessary in order "to provide for equitable distribution of fuel oil in the areas of shortage."[4] Fuel oil rations for heat and for hot water were provided. Machinery was established for the regulation of the flow of fuel oil from suppliers to consumers. Only a few of those regulations are relevant here. Transfers of fuel oil to consumers were allowed only in exchange for ration coupons.[5] A dealer obtaining fuel oil from his supplier was generally required to surrender ration coupons within five days after the transfer.[6] Dealers were required, with exceptions not material here, to keep records of sales to consumers showing their names and addresses, the date and amount of the transfer, and the coupons detached.[7] Provision was also made for "suspension orders" as follows:[8]

> "Any person who violates Ration Order No. 11 may, by administrative suspension order, be prohibited from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any fuel oil or other rationed product or facility. Such suspension order shall be issued for such period as in the judgment of the Administrator, or such person as he may designate for such purpose, is necessary or appropriate in the public interest and to promote the national security."

On December 31, 1943, a suspension order was issued against petitioner, a retail dealer in fuel oil in the District of Columbia. It was found that petitioner had obtained large quantities of fuel oil from its supplier without surrendering any ration coupons. It was found that petitioner had delivered many thousands of gallons of fuel oil to consumers without receiving ration coupons in exchange;[9] and that in some instances petitioner delivered fuel

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3 *Id.*, p. 8480.

4 *Id.*, p. 8480. Ration Order No. 11 initiated rationing of fuel oil in thirty eastern, southeastern, and midwestern states and in the District of Columbia.

5 § 1394.5652.

6 §§ 1394.5707, 1394.5708.

7 § 1394.5656.

8 § 1394.5803. And see 8 Fed. Reg. 2720.
The Office of Price Administration conferred on its Hearing Commissioners and Hearing Administrator the function of issuing suspension orders. General Order 46, 8 Fed. Reg. 1771. It also adopted, Feb. 6, 1943, Procedural Regulation No. 4, which prescribed the procedure to be used in the issuance of rationing suspension orders. 8 Fed. Reg. 1744. And see 9 Fed. Reg. 2558 for the revision of this regulation, issued May. 6, 1944.

9 Some 328,000 gallons according to OPA, around 181,000 gallons on petitioner's computation.

oil to consumers without receipt of valid ration coupons in exchange.[10] Petitioner was also found to have failed to keep the required records showing its transfers of fuel oil to consumers. The suspension order prohibited petitioner from receiving fuel oil for resale or transfer to any consumer for the period from January 15, 1944 to December 31, 1944, the date when the Second War Powers Act expires. The order provided, however, that if petitioner furnished the Office of Price Administration with a list of consumers to whom it had sold fuel oil from October 21, 1941, to October 21, 1942, and if it surrendered all void ration coupons in its possession, it might transfer fuel oil to any consumer to whom it had transferred fuel oil during the year subsequent to October 21, 1941[11] and receive fuel oil sufficient for that purpose. The order finally provided that if the Petroleum Administrator for War[12] should certify that the fuel oil needs of the District of Columbia could not be met by the supplies and the facilities of other suppliers and dealers in the area and that it was therefore essential to the welfare of the community that the provisions of the suspension order be modified, the restrictions might be wholly or partly removed.[13] The suspension order was issued after notice and hearings as provided in the regulations which govern the procedure in such cases.[14]

The present suit was brought in the District Court for the District of Columbia to enjoin the enforcement of the suspension order. A temporary restraining order was issued. Respondents moved for summary judgment. That motion was granted and the complaint was dismissed. On the appeal that judgment was affirmed. 140 F. 2d 703. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem in the administration of the rationing regulations.

The sole question presented by this case is whether the power of the President under § 2(a)(2) of Title III of the Second War

[10] The OPA Hearing Administrator found "The record is replete with proof that respondent did commit, with reference to transfers to consumers, practically every sort of violation known to the regulations—making deliveries for expired coupons, unmatured coupons, no coupons at all and making emergency deliveries in excess of the quantities permitted."

[11] Ration Order No. 11 became effective October 22, 1942.

[12] Established December 2, 1942, by Executive Order No. 9276, 7 Fed. Reg. 10091.

[13] The suspension order also provided for an accounting by petitioner of its fuel oil transactions since October 22, 1942.

[14] Procedural Regulation No. 4, *supra*, note 8.

Powers Act to "allocate" materials includes the power to issue suspension orders against retailers and to withhold rationed materials from them where it is established they have acquired and distributed the rationed materials in violation of the ration regulations.

We state the question that narrowly because of the posture of the case as it reaches us. The constitutional authority of Congress to authorize as a war emergency measure the allocation or rationing of materials is not challenged. No question of delegation of authority is present. It is assumed, on petitioner's concession, that the President has validly delegated to the Office of Price Administration whatever authority he has under § 2(a)(2) of Title III of the Act. And no question is raised, like those involved in *Yakus* v. *United States*, 321 U. S. ——, and *Bowles* v. *Willingham*, 321 U. S. ——, concerning the authority of Congress to delegate to the President in this way the power to allocate materials. No contention is made that petitioner was deprived of fuel oil without a hearing and an opportunity to defend. Nor is it argued that, although the power to issue suspension orders exists, that power was abused in this instance, so as to give rise to judicial review, and the limits of the authority exceeded by the specific provisions of the order which is before us. And finally, no challenge is made of the findings which underlie this suspension order.[15]

The argument, rather, is that the authority to "allocate" materials does not include the power to issue suspension orders; and that no such power will be implied since suspension orders are penalties to which persons will not be subjected unless the statute plainly imposes them. *See Tiffany* v. *National Bank*, 18 Wall. 409, 410; *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356, 362; *Wallace* v. *Cutten*, 298 U. S. 229, 237. In that connection it is pointed out that Congress provided criminal and civil sanctions for violations of Title III of the Act. By § 2(a)(5) any person who wilfully violates those provisions of the Act or any rule, regulation or order promulgated thereunder is guilty of a misdemeanor and subject to fine and imprisonment. By § 2(a)(6) federal courts have power, among others, to enjoin any violation of those provisions of the Act or any rule, regulation or order thereunder.

[15] The Government has conceded that there may be judicial review of suspension orders.

It is therefore contended that when violations of regulations under the Act are used as the basis for withholding rationed materials from persons, sanctions for law enforcement are created by administrative fiat contrary to the Act in question and contrary to constitutional requirements.

We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. *United States* v. *Two Hundred Barrels of Whiskey*, 95 U. S. 571; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599; *Wallace* v. *Cutten, supra.* Hence we would have no difficulty in agreeing with petitioner's contention if the issue were whether a suspension order could be used as a means of punishment of an offender. But that statement of the question is a distortion of the issue presented on this record.

The problem of the scarcity of materials is often acute and critical in a great war effort such as the present one. Whether the difficulty be transportation or production, there is apt to be an insufficient supply to meet essential civilian needs after military and industrial requirements have been satisfied. Thus without rationing, the fuel tanks of a few would be full; the fuel tanks of many would be empty. Some localities would have plenty; communities less favorably situated would suffer. Allocation or rationing is designed to eliminate such inequalities and to treat all alike who are similarly situated. The burdens are thus shared equally and limited supplies are utilized for the benefit of the greatest number. But middlemen—wholesalers and retailers—bent on defying the rationing system could raise havoc with it. By disregarding quotas prescribed for each householder and by giving some more than the allotted share they would defeat the objectives of rationing and destroy any program of allocation. These middlemen are the chief if not the only conduits between the source of limited supplies and the consumers. From the viewpoint of a rationing system a middleman who distributes the product in violation and disregard of the prescribed quotas is an inefficient and wasteful conduit. If the needs of consumers are to be met and the consumer allocations are to be filled, prudence might well dictate the avoidance or discard of such inefficient and unreliable means of distribution of a scarce and vital commodity. Certainly we could not say that the President would lack the power under

this Act to take away from a wasteful factory and route to an efficient one a precious supply of material needed for the manufacture of articles of war. That power of allocation or rationing might indeed be the only way of getting the right equipment to our armed forces in time. From the point of view of the factory owner from whom the materials were diverted the action would be harsh. He would be deprived of an expected profit. But in times of war the national interest cannot wait on individual claims to preference. The waging of war and the control of its attendant economic problems are urgent business. Yet if the President has the power to channel raw materials into the most efficient industrial units and thus save scarce materials from wastage it is difficult to see why the same principle is not applicable to the distribution of fuel oil.

If petitioner established that he was eliminated as a dealer or that his quota was cut down for reasons not relevant to allocation or efficient distribution of fuel oil, quite different considerations would be presented. But we can make no such assumption here. The suspension order rests on findings of serious violations repeatedly made. These violations were obviously germane to the problem of allocation of fuel oil. For they indicated that a scarce and vital commodity was being distributed in an inefficient, inequitable and wasteful way. The character of the violations thus negatives the charge that the suspension order was designed to punish petitioner rather than to protect the distribution system and the interests of conservation. Moreover, there is the following finding in support of the limitation on the number of customers which petitioner may hereafter service:

> "We have no way of knowing how many customers the respondent corporation can serve while at the same time faithfully observing the rationing regulations. But we do know from its clearly established violations from the very inception of fuel-oil rationing that the number it then served approached the upper limit of its capacity since the fact is clear that it did not (whether it would not or could not) thereafter both service this number and simultaneously comply with the rationing regulations. Additional customers, then, clearly impose a burden which the respondent cannot bear."

None of the findings is challenged here. Taken at their face value, as they must be, they refute the suggestion that the order was based on considerations not relevant to the problem of alloca-

tion. They sustain the conclusion that in restricting petitioner's quota the Office of Price Administration was doing no more than protecting a community against distribution which measured by rationing standards was inequitable, unfair, and inefficient. If the power to "allocate" did not embrace that power it would be feeble power indeed.

What we have said disposes of the argument that if petitioner has violated Ration Order No. 11 the only recourse of the government is to proceed under § 2(a)(5) or § 2(a)(6) which provide criminal and civil sanctions. Those remedies are sanctions for the power to "allocate". They hardly subtract from that power. Yet they would be allowed to do just that if it were held that violations by middlemen of the ration orders and regulations could never be the basis of reallocation of fuel oil into more reliable channels of distribution.

It is finally pointed out that Congress has seldom used the licensing power[16] and that that power, when used, has been employed sparingly. Thus one of the sanctions of the Emergency Price Control Act of 1942 (56 Stat. 33, 50 U. S. C. App. (Supp. III) § 925) is the power to revoke licenses for violations of maximum prices or rents. § 205(f). That power may be utilized only in judicial proceedings; and licenses may be suspended only for limited periods. § 205(f)(2). That consideration would be germane to the present problem if Congress had implemented the allocation procedure with a licensing system. Then the question might arise whether revocation of the license rather than the reallocation of materials by administrative action was the appropriate procedure in case of violations. Congress, however, did not adopt the licensing system when it came to rationing. And the failure to do so is hardly a reason for saying that the power to "allocate" is less replete than a reading of the Act fairly permits.

Affirmed.

Mr. Justice ROBERTS dissents.

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[16] See § 5 of the Act of August 10, 1917, 40 Stat. 276, 277.